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THE LAW

OF

LIMITATION AND PRESCRIPTION

(IN BRITISH INDIA)

INCLUDING EASEMENTS

WITH

AN APPENDIX OF ACTS, AND A FULL COMMENTARY ON ACT XV OF 1877.

BY

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Zammeraru v. Pantina, 6 Mad., 301 778
Zinlnissa v. Motideb, I. L. R., 12 Bom., 268 281
Zulfikar v. Manna, I. L. R., 3 All., 148 ... ... 560, 704

Unreported cases of the Cal. High Court ... 370, 567, 786, 815, 825, 835, 694, 849

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LECTURE I.

LIMITATION AND PRESCRIPTION.

Definitions—(What are *not* laws of limitation strictly so called)—Prescription according to the Code Napoleon—Prescription from another point of view—Restrictive, exonerative, or exemptive prescription—Extinctive prescription—Negative prescription—Acquisitive, positive, or affirmative prescription—Positive prescription distinguished from negative prescription—Translative and constitutive prescription—Prescription according to English lawyers in general—Acquisition by prescription distinguished from acquisition by occupation—The subject-matter of restrictive prescription, of acquisitive prescription, of extinctive prescription—The terms 'prescription' and 'limitation' as used here—Immemorial prescription—Prescription distinguished from the doctrine of presumption—The six significations of prescription—Tables showing the several departments of prescription—The several modes of operation of this law in British India—Positive prescription how far recognised—Extinctive prescription how far recognised—Prescription recognised by the ancients and the moderns in general—The slow progress of the doctrine in England and British India—The law of the Romans—The Hindu law—Yajnyawalcya—Vyasa—Vrihaspati—Narada—Manu—Catyayana—The Mitakshara—Vrihaspati—Bombay Sudder Dewany Adawlat—Table of analogous provisions—Sir William Jones on the Mitakshara—Colebrooke on the same subject—Bengal Reg. II of 1805—Sir T. Strange—Dr. Markby.

Definition.

A Law of Limitation limits the time *after* which a suit, or other proceeding, cannot be maintained in a Court of Justice.[1]

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[1] A law of limitation limits or prescribes a time at the *end* of which persons liable to suit shall become *exempt* from answering therein. (Buswell on Limitations and Adverse Possession, p. 1).

Definition. (From *defendant's* point of view).

A law which restrains a person from bringing a suit, *before* the expiration of a defined period, is not a law of limitation in the ordinary sense of the term. For an example, see Sec. 37 of the Bengal Tenancy Act, VIII of 1885, according to which a second suit for enhancement of rent, on certain grounds, cannot be brought *before* the expiration of 15 years from certain dates. But limitation strictly so called, is a bar to the institution of a suit *after* a definite period. A law which merely *postpones* or *suspends* the creditor's right is *not* a law of limitation. So where a law imposes a *condition* upon the exercise of a right granted, as that it shall be exercised within a certain time, it is not strictly a law of limitation. (Buswell on Limitations, p. 1). A clause defining the period of enjoyment required for the acquisition of a right may impose a *condition* that the *right* shall *not* be *acquired* unless the enjoyment was proved to have continued within two years of the institution of the suit for establishing such right. (See cl. 4, Sec. 26, Act XV of 1877). Such a clause is not a clause of limitation properly so called. (See notes under Sec. 26, Act XV, in the Appendix).

What are *not* laws of *limitation* strictly so called.

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Definition.

A Law of Prescription prescribes the period, at the expiry of which a substantive or primary right is (under certain circumstances) acquired or extinguished.

Prescription in its specific sense.

The term 'prescription' as here used, excludes, and is opposed to, limitation. It differs from limitation in the same way as one species differs from another species of the same genus.[1] But in the French, Scotch, Italian, Spanish and other systems of law, which are descended from, or are assimilated to, the Roman or Civil Law, the term is used as the name of the genus itself, and, as such, it includes and comprises limitation. In this *generic* sense, prescription is defined by the Code Napoleon,[2] as a means of acquisition or of exoneration, by a *certain* lapse of time, and under conditions determined by the *law*.[4] This definition considers prescription from one point of view. It directs our attention to the person prescribing, that is, the person benefiting by prescription, and refers to *his* acquisition (of a right) or *his* exoneration (from a liability).

Prescription according to the Code Napoleon.

Prescription from another point of view.

But prescription supposes a contest of claimants,[5] a contest between the person gaining, and the person losing, by prescription. With reference to the latter, prescription is a means of restricting, extinguishing, or (expressly) transferring rights, by a *certain* lapse of time, and under conditions defined by *law*.[6]

(German terms).

[1] In Germany the acquisition of ownership by possession is called "Ersitzung," and the bar to the action "Verjahrung." (Dr. Markby's Elements of Law, 3rd Ed., Sec. 551).

[2] Code Napoleon, Art. 2219.

Angell.

[4] Similarly Mr. Angell, referring to the Civil Code of Louisiana, says: "Prescription is either an instrument of the *acquisition* of property or an instrument of an *exemption* only from the servitude of judicial process." (See Angell on the Limitations of Actions, 3rd Ed., Sec. 2). The jurisprudence of the State of Louisiana, one of the United States, is fashioned on that of Spain. Prescription is an instrument either of *acquisition of title* or of *statutory exemption from suit* by a certain lapse of time. (Buswell, p. 1).

Buswell.

[5] See Montriou's Institutes of Jurisprudence, p. 177.

"Prescription is a mode of settling *disputed claims*."—Encyclopædia Brittanica.

Prescription in the widest sense.

Thibaut.

[6] The term 'prescription,' I may observe, is sometimes employed with a still wider signification. Taking the term with this very extensive meaning, the great German Jurist Thibaut divides prescription into I—Definite, and II—Indefinite; and sub-divides definite prescription into (1) Legal, (2) Judicial, (3) Testamentary, and (4) Conventional. Prescription is definite or indefinite according as the length of time required is exactly defined or not. A fixed number of days, months or years from a determinable event (*e.g.*, from the accrual of the cause of action), or all the time from a fixed date (as from 1189 or 1765 A.D.), is a defined, or definite period of time. But "time whereof the memory of man runneth not to the contrary," "a vast number of years" or "a long or a considerable period of time" is evidently

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Restrictive, exonerative, or exemptive prescription.

A right is *restricted* by prescription when it is not allowed to be actively enforced by an action, or other proceeding, in a Court of Justice. The judicial remedy is barred, but the (substantive) right itself survives[7] and continues to be available in other ways. Thus, a creditor may, even after the expiration of the prescribed period, obtain payment of the money due to him through the medium of any lien that he may hold on the property of his debtor.[8] Again, if a debt barred by lapse of time be discharged by payment,

indefinite. Definite prescription is legal, judicial, testamentary, or conventional, according as the period of prescription is set or prescribed by a law, a judicial decision, a will, or an agreement. It is, however, not usual for English writers to distinguish prescription into legal on the one hand, and judicial, testamentary, or conventional on the other. (See Lindley's Translation of Thibaut's System des-Pandekten Rechts, pp. 171—175, and Appendix, p. cvii).

The definition of 'prescription' given in the text is a definition of definite legal prescription.

[7] In so far as (restrictive) prescription bars the remedy without extinguishing the right, it is a legislative violation of the general principle "where there is a legal right there is also a legal remedy" by suit or action at law. (*Ubi jus ibi remedium*). The judicial remedy or right of action is not a primary, but a sanctioning or secondary, right. A right of *recapturing* without resorting to action, and a right of *retainer* or *detention* until a lien is satisfied, are instances of sanctioning rights which may be exercised *extrajudicially*.

(Extrajudicial remedies).

Limitation is *practically* 'prescription' in *some* cases.

The tendency of the modern cases is to hold that a law of limitation regarding the possession and dispossession of *immoveable* property (in the *absence* of a Statute fixing a *longer* period of *prescription*) generally extinguishes the (primary) right itself. In so far as it does this, it is *practically* a law of prescription. (See Calcutta Sudder Dewany Select Reports, Vol. VI, p. 139; Rambhat *v.* The Collector, I. L. R., 1 Bom., 592; Sitaram *v.* Khanderav, *ibid*, 286; Shibchunder *v.* Shibkissen, 1 Boulnois, 70; Gunga Govind *v.* The Collector, 7 W. R., 21 P. C.: 11 Moo. I. A., 345; Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, at p. 226). But it has been held in Madras that Madras Reg. II of 1802, and Act XIV of 1859, did *not extinguish the right* to immoveable property, and that they only *barred the remedy* to recover such property by proceedings in a Court of Justice. (See Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175; Doe *v.* Kuppu Pillai, 1 Mad. High Court, 89). Where the right is *not extinguished* by a particular Limitation Act, if the owner regains the property extrajudicially, he is remitted to his old title, and the party who held it adversely cannot recover it, except under some special provision as that contained in Sec. 9, Act I of 1877. See Rambhat *v.* The Collector, I. L. R., 1 Bom., pp. 598-9, and Lecture III, *infra*.

(Remitter).

[8] Stephen's Commentaries, Bk. V, Chap. XI; Angell, Sec. 73. Mr. Justice Pontifex in Nursing *v.* Hurryhur (I. L. R., 5 Cal., 897, 899) says: "If the creditor had a lien on the goods of his debtor on a general account, he would be entitled to hold the goods for a debt, the recovery of which was barred by the Limitation Act. And probably it would be held that an executor would be allowed to retain, out of a legacy, a debt owing by the legatee to the testator, though its recovery was barred by the Act." As to a wharfinger's lien, see Spears *v.* Hartley, 3 Esp., 81. As to an attorney's lien, see Higgins *v.* Scott, 2 B. & Ad.,

(Liens and pledges).

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the payment cannot be recalled.[9] And a fresh promise made in writing, and signed by the debtor or his agent, to pay such a debt, is as binding as any other valid contract.[10] When a right is restricted by prescription, the person subject to the corresponding duty is exonerated or exempted from the liability to be sued or proceeded against in a Court of Justice. Restrictive prescription or limitation may, therefore, be also called Exonerative or Exemptive prescription.

Extinctive prescription.

A person's right is *extinguished* by prescription when he cannot assert it either judicially or extrajudicially. It ceases to exist so far as he is concerned. But as a mode of losing rights is often a mode of acquiring them, the right is virtually (though not expressly or directly) transferred to the person who claims it by prescription.[1] Where prescription extinguishes the (substantive) right itself, the remedy (whether judicial or otherwise) is necessarily lost or barred.

Negative prescription.

Extinctive prescription, like restrictive prescription, is based on the ground that the person entitled to the right has (*passively*) neglected to avail himself of it for the law-defined period. These two sorts of prescription may be classed together under the head of 'negative prescription' which takes away the remedy or the right of a definite person,

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413. As to an acceptor's right to *retain* the drawer's money, see Kerrison *v.* Williams, 3 Campb., 418. As to the pawnee's right to *retain* the pledge, see Sec. 176 of the Indian Contract Act. See also Lecture VIII, and Buswell, pp. 199, 200.

[9] Angell, Sec. 7. See Bizu *v.* Dickason, 1 T. R., 286, 287; Farmer *v.* Arundel, 2 W. Bla., 824; Le Roy *v.* Crowninshield, cited in Buswell on Limitations, p. 10. The payment cannot be recalled, because the payment itself is a conclusive admission that the debt was subsisting at the time it was made (*ibid.*) But by the French law, if the debtor show clearly that he paid the debt under a mistake as to the fact of his right to plead limitation, he may recover it back (*ibid.*)

(Payment of barred debts lawful).

Sections 60 and 63 of Act IX of 1872 expressly allow the application of payments, under certain circumstances, to the discharge of time-barred debts. Executors, administrators, and Hindu widows, in their representative capacities, are allowed credit for the payment of such debts. (Tillakchand *v.* Jaitmal, 10 Bom., 206; The Administrator-General *v.* Hawkins, I. L. R., 1 Mad., 267; Bhala Nahana *v.* Parbhu Hari, I. L. R., 2 Bom., 67; Chimnaji *v.* Dinkar, I. L. R., 11 Bom., 320; Lewis *v.* Rumney, L. R., 4 Eq., 451; and Banning on the Limitation of Actions, pp. 224-225).

[10] The Indian Contract Act, 1872, Sec. 25, cl. 3.

[1] Professor Bell of Scotland observes that no right is extinguished by prescription "unless there be an opposite right in the course of being confirmed at the same time." The right which is said to be extinguished is not forfeited to the State or rendered ownerless. It vests in the opposite party. (See Montriou's Institutes, pp. 176-177). This is probably the reason why the definition given by the Code Napoleon does not refer to the *extinction* of rights. *Acquisition* by prescription *implies* and *involves* the extinction of another's right.

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but does not *directly* or *positively* confer on any one a right which he can enforce against the world.[2]

Transferring, acquisitive, positive, or affirmative prescription.

Where prescription not only bars the remedy, and extinguishes the right, of the original holder, but *directly* and *avowedly* transfers his right to the opposing claimant, the latter acquires a positive title against all the world. This *transferring* prescription has, accordingly, been called 'acquisitive prescription.' It is also termed *positive* or *affirmative* prescription, as opposed to *negative* prescription. It is positive or affirmative, because it not merely negatives the right of the late owner, but positively affirms or declares that the adverse party has acquired that right by his *active* or positive enjoyment thereof, for the time and under the conditions, prescribed by law. Negative prescription prevents the old right-owner from asserting his right, and secures his adversary against any further claims on his part. Positive prescription secures to the "prescriber" the enjoyment of a right by preventing *all* other persons from disputing it after the law-defined term.

Positive prescription distinguished from negative prescription.

Translative and constitutive prescription.

By 'translative' prescription the *whole* of the proprietary rights of the late owner are transferred to his opponent. By 'constitutive' prescription *fragmentary* rights, like easements, are so transferred.

Prescription according to English lawyers in general.

Lord Coke, it would appear, confines the term prescription to acquisitive prescription only.[4] And most English lawyers use the term in a still more limited sense, *viz.*, as denoting

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Austin's view of the distinction.

[2] The distinction between positive and negative prescription (in respect of their *effects*) turns upon the nature of the evidence which it is requisite to give in order to enable the owner to recover the thing when detained by a stranger. It may be only necessary to show *anterior possession*, in order to enable him to maintain an action; or to maintain an action it may be necessary for him to show his *title*. If it be necessary to show his title, then, unless a title may be acquired by prescription, he cannot sustain the action. But the right which he possesses under the Statute of *Limitation* would not enable him to maintain an action against a third party.—(Austin's Lectures, Lect. XXVII. See also Markby's Elements of Law, 3rd Ed., Sec. 550. Cf. notes 7 & 1, *supra*). Notwithstanding Sec. 34 of 3 & 4 Will. IV, c. 27, it may be said that, in respect of corporeal things, positive prescription in its *direct* form is unknown to the English law.—Austin, Lect. XXVI, notes by the editor, Mr. Campbell.

[3] As the notion of extinctive prescription involves that of restrictive prescription, so the notion of acquisitive prescription involves that of extinctive prescription. In the words of Lord St. Leonards "there is a negative prescription even where a positive prescription also intervenes." The two are blended with each other.

Prescription defined by Lord Coke.

Pothier.

[4] Lord Coke defines 'prescription' as the acquisition of title under the authority of law by length of time and enjoyment. "Prescription is a title taking his substance of use and time allowed by law." (Coke upon Littleton, Vol. I, 114*a*). Pothier also defines 'prescription' as the means by which a man acquires the ownership of a

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that branch of acquisitive prescription which deals with the acquisition of easements and other *incorporeal* heritable rights."[a]

Acquisition by prescription distinguished from acquisition by occupation.

The acquisition of the right of ownership of a thing by prescription should be distinguished from a similar acquisition by occupancy or occupation. A thing which has no owner, (*res nullius*), may be acquired by simple occupation or apprehension. No length of time is required to complete the title, nor is a contest of claimants or adverse possession possible under the circumstances. So the prior appropriation of a new trade-mark or trade-name may give an exclusive title to it without the aid of prescription.[b] But acquisition by prescription supposes that the thing is *another's*, (*res alicujus*), and that it is acquired after an *adverse* enjoyment or possession for a certain period of time.

The subject-matter of restrictive prescription.

Limitation or restrictive prescription, as such, does not affect the existence or continuance of primary rights, whether *in rem* or *in personam*.[c] It has for its immediate subject judicial remedies only.

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thing through the peaceable and uninterrupted possession of it for a period of time determined by the law. (See Markby's Elements of Law, 2nd Ed., Secs. 382 & 393).

Phillimore.

In Phillimore's Private Roman Law, p. 125, 'prescription' is defined as "the right which, after undisputed possession of a thing for a time fixed by law, makes the thing so possessed our own."

Hall. (Prescription *and* presumption).

In Hall's International Law, p. 111, the author says: "Title by prescription arises out of a long continued possession where no original source of proprietary right can be shown to exist, or where, possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so."

Domat.

Domat's definition is *more general*. "Prescription is a manner of *acquiring* and *losing* the right of property in a thing, and *all* other rights, by the effect of time." (Civil Law, Vol. I, Sec. 2196). Prescription includes the limitation of actions. (*Ibid.*, Secs. 2186, 2193).

[a] Wilkinson *v.* Proud (11 M. & W., 35) shows that in England the title by prescription properly applies to *no other* than *incorporeal* hereditaments. So also in America. (Washburn on Easements, 4th Ed., p. 124).

[b] See *India Gazette*, 3rd December 1881, p. 1348; see also Lavergne *v.* Hooper, I. L. R., 8 Mad., 149, at p. 154; Goodfellow *v.* Prince, 35 Ch. D., 9.

Rights *in rem* and *in personam*. Primary and secondary rights.

[c] Rights *in rem* are rights available against persons generally, *e.g.*, the right of ownership, a right of way or other easement, &c. All rights *in rem* are primary, *i.e.*, they exist independently of other rights, and are not founded on injuries, delicts or wrongs. Rights *in personam* are available against determinate persons only. Such rights may be primary as well as secondary or sanctioning. Primary rights *in personam* arise directly out of contracts or *quasi*-contracts. All sanctioning rights are rights *in personam*; they exist only for the sake of enforcing other rights and arise out of *breaches* of contracts and *quasi*-contracts, infringements of rights *in rem*, and crimes. Sanctioning rights cannot, of course, be acquired by prescription. A right of action, a right of re-capturing without resorting to action, a lien or a right of detention, under certain circumstances, of a thing belonging

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—of acquisitive prescription.

Rights *in personam*, arising, as they do, out of contracts, *quasi*-contracts or injuries, cannot, from their very nature, be acquired by prescription. Certain[7] rights *in rem*, such as rights of ownership of corporeal things, easements, and other incorporeal heritable rights, constitute the subject of acquisitive or positive prescription.[8]

—of extinctive prescription.

Extinctive prescription may operate upon rights *in rem*[9] as well as rights *in personam*.

Of the three species of prescription proper (that is, of definite legal prescription) two, the acquisitive and the extinctive, directly affect the substance of the right itself, and as such, are included under the head of Substantive Law. In the title of these lectures, the term 'prescription' denotes these two species, as opposed to the third (namely, the restrictive), which affects the form of the remedy only, and is a part of adjective or formal law.

The terms 'prescription' and 'limitation' as used here.

Definite legal prescription in the *generic* sense.
- 1. Acquisitive. } I. Prescription (as opposed to limitation). (A department of substantive law).
- 2. Extinctive. } I. Prescription (as opposed to limitation). (A department of substantive law).
- 3. Restrictive. { II. Limitation. (A department of adjective law).

Immemorial prescription.

Besides these three kinds of prescription there is what is called an indefinite prescription. This does not depend particularly upon any *express law*. Immemorial prescription (which is a species of indefinite prescription) rests on the principle that a person who has enjoyed a right, from time whereof the memory of man runneth not to the contrary, must be treated and regarded as if he had acquired such right by means of some valid transaction which can no longer be proved.[10]

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to the debtor, are sanctioning rights. See Austin's Jurisprudence, pp. 45 *et seq*; and Markby's Elements of Law, 2nd Ed., Sec. 140.

[7] A person's *natural* rights *in rem*, such as his right to reputation, his right to personal security, his right to unpolluted air, and his right to the water of natural streams, need not be acquired at all, and are not, so far, the subject of acquisitive prescription. Such rights require no age to ripen them.

[8] "There are other rights, besides ownership and *jura in re aliena*, to which prescription can be applied. The Roman law applied it to marriage; and it is applied to such rights as to take toll or hold a market." (Markby, 3rd Ed., Sec. 590).

[9] But the inborn or natural rights *in rem* which Blackstone calls absolute rights, *viz.*, rights to personal security, liberty and reputation, and the capacity to acquire rights of ownership, cannot obviously be extinguished by prescription.

[10] In addition to ordinary prescription, "there is," says Vattel, "another called immemorial, because it is founded on immemorial possession, the origin of which is unknown or so deeply involved in

Vattel.

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Prescription distinguished from the doctrine of presumption.

Three points of distinction.

Adverse enjoyment for a considerable period[1] of time, though it is proved that the enjoyment began within living memory, is often the basis of a similar presumption of some lawful and valid origin of the enjoyment. These presumptions frequently supply the place of prescription proper, but are distinguishable from it.[2] *First*, they do not *directly* make length of enjoyment a title in itself; *secondly*, they are not founded on any express and absolute rule of law; and *thirdly*, while prescription assumes that the party prescribing had originally no right or title, or only an imperfect or an invalid one, "the doctrine of presumption goes on the footing of validity, and upholds validity, by supposing that everything was present which that validity required."[3]

Immemorial prescription.

(The modern *peculiar* English sense of the term).

obscurity as to allow no possibility of proving whether the possessor has really derived his right from the original proprietor or received the possession from another." "Immemorial possession is an irrefragable title, and immemorial prescription admits of no exception." (Law of Nations, Bk. II, Ch. XI). The immemorial prescription of English law was *originally* indefinite, but by a judicial usurpation of legislative power, the time of legal memory has been fixed to be (the same as the limitation of real actions by the Statute of Westminster, namely) the commencement of the reign of Richard I, A.D. 1189. See Dalton *v.* Angus, 6 App. Cas., 811.

"Time immemorial" according to Littleton, as well as the Roman lawyers, meant "within the recollection of those living and what they had heard from others speaking from their own recollection." Dr. Markby says that, in the case of immemorial enjoyment, there is no *acquisition* of a right, but only a *presumption* in favour of the legal origin of a right. (Elements of Law, 3rd Ed., Sec. 565). No length of possession will, in law, create a *conclusive* presumption of title, unless by force of a *positive statute*. (Buswell, p. 3).

[1] Such period is evidently indefinite. In the absence of an express law applicable to the particular case, judges determine the period by *analogy* to the Statute of Limitation or Prescription. (See Buswell, p. 2).

[2] English Judges have often been obliged to confound the distinction between the acquisition of a right under a definite *rule of law* by prescription, and the *inference* of right as a *fact* by evidence of possession. See Markby's Elements of Law, 2nd Ed., Secs. 384*a* and 417.

Doctrine of presumption.

[3] *Per* Lord Westbury in Lee *v.* Johnstone, L. R., 1 *Scotch App.*, 426, 435. "Where there has been long continued possession which is consistent with a legal title, every reasonable presumption ought to be made, in order to support the possession and maintain it as having been of right." Phillips *v.* Halliday (1891) A. C., 228, at p. 234. "Where there has been long continued possession in assertion of a right, it is a well settled principle of English law that the right should be presumed to have had a legal origin if such legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title." (Per Lord Herschell, *ibid.*, at p. 231).

Even as regards limitation or restrictive prescription, it may be observed that the want of an express law is often supplied by (what the English Real Property Commissioners in their first Report, p. 39, call) a doubtful doctrine of presumption. (See Banning on Limitation, p. 2). Thus, when the English Statute of Limitation was not applicable to

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From what has been already stated, it appears that the term 'prescription' has six significations: The six significations of prescription.

1*st*—It not only comprises definite legal prescription, but indefinite prescription as well.

2*nd*.—It denotes definite legal prescription, and includes not only acquisitive and extinctive prescription, but also restrictive prescription or limitation. (Proper and generic).

3*rd*.—It excludes limitation, and signifies acquisitive and extinctive prescription.[3a] (Proper and specific).

4*th*.—It is restricted to acquisitive or positive prescription.

5*th*.—It is applied to that branch of acquisitive prescription which relates to the ownership of *corporeal* things.

6*th*.—It is limited to the acquisition of easements and other *incorporeal* rights *in rem*.[4]

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bonds and other speciality, an artificial presumption of payment from non-demand for twenty years was established by analogy to the Statute. (Angell, Sec. 93).

[3a] The 2*nd* and 3*rd* are prescription *proper*, (*i.e.*, definite *legal* prescription) in its *generic* and *specific* senses.

[4] The six authorities for these six significations are: 1*st*—Thibaut; Authorities for these 2*nd*—Modern Civilians in general, and the Indian Law Commissioners' Special Report of the 26th February 1842; 3*rd*—Sir James Colvile's Limitation Bills of 1855 and 1859; Professor Bell; 4*th*—Lord Coke; 5*th*—The usucapio of the Romans; see also the definitions given by Pothier and Phillimore, *supra*; 6*th*—English lawyers in general. (See Stephen's Blackstone, and Wilkinson *v.* Proud, 11 Mee. and W., 35). Sir Barnes Peacock, C. J., and Sir Richard Garth, C. J., on some occasions used the term 'preseriptioh' *not* as meaning prescription *proper*, but as denoting either *immemorial* prescription, or the doctrine of the *presumption* of a lost modern grant or some other lawful origin. Using the term 'prescription' for 'immemorial prescription,' Peacock, C. J., said: "Prescription in England is not the same as prescription in the mofussil." (See Joyprokash *v.* Ameer Ali, 9 W. R., 91. Using the term, for 'prescription by the presumption of a lost modern grant or some other lawful origin,' Garth, C. J., said: "Easements may still be claimed in this country by prescription, and when they are so claimed, the principles which apply to their acquisition in England will be equally applicable in this country. But those principles do not necessarily apply to the acquisition of easements under the Limitation Act." (See Arzan *v.* Rakhal, I. L. R., 10 Calc., 214, 218). It should be observed that the *old* doctrine of *immemorial* prescription *is* recognised in India as well as in other countries. (See Punja *v.* Baikuvar, I. L. R., 6 Bom., 20, 23; Gooroo Pershad *v.* Bykunto, 6 W. R., 82, 83; Koylas *v.* Sonatan, I. L. R., 7 Calc., 132, 136). Immemorial prescription in its *present peculiar* English sense of the term is inapplicable to British India. The acquisition of easements under the Limitation Acts of 1871 and 1877, as well as under the Easements Act of 1882, is matter of positive *law*, and does not require any *presumption* to support it. Prescription by *twenty* years' user of easements (other than the right to light), even under the English Prescription *Act* of 1832, is possible only under the conditions which were generally necessary under the doctrine of *presumption* which had been introduced before its enactment. (See Lect. XII). Peacock, C. J., and Garth, C. J.

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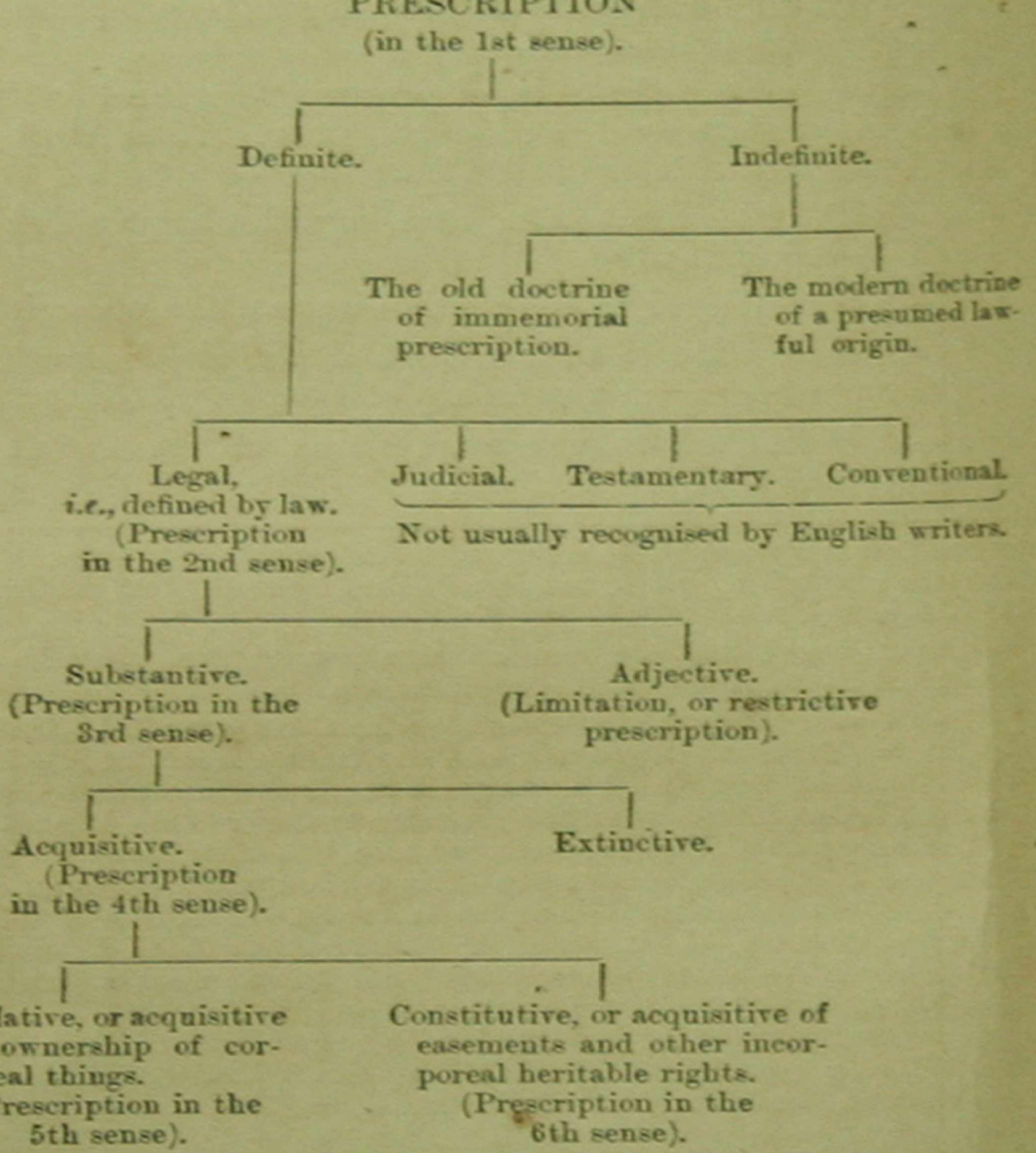
The following table shows the several meanings of prescription :—



Tables showing the several departments of prescription.

The tables below show the several departments of prescription *proper*, *i.e.*, of definite legal prescription :—

I.

Prescription (using the term as the name of a *genus*).	1. Prescription (using the term as the name of a *species*).	*a.* Acquisitive ...		Positive.
		b. Extinctive ...		Negative.
	2. Limitation ...	Restrictive ...		Negative.

II.

Prescription (using the term as the name of a *genus*).	1. Positive or affirmative or acquisitive.	*a.* Translative ...		Prescription (using the term as the name of a *species*).
		b. Constitutive ...		Prescription (using the term as the name of a *species*).
	2. Negative.	*a.* Extinctive ...		Limitation.
		b. Restrictive or exemptive or exonerative.		Limitation.

III.

PRESCRIPTION *PROPER* (in its generic sense).

- **I. Acquisitive.**
  - 1. Of the ownership of corporeal things. (The Roman *usucapio*).
    - (*a*) Moveable.
    - (*b*) Immoveable. (Bombay Reg. V of 1827, sec. 1; the Statute of possession of the Island of Jamaica).
  - 2. Of incorporeal heritable rights *in rem*. (Prescription in English law).
    - (*a*) Easements. (2 & 3 William IV, c. 71; sec. 27, Act IX of 1871; sec. 26, Act XV of 1877; sec. 15, Act V of 1882).
    - (*b*) Other incorporeal rights, *e.g.*, the exclusive right of levying a toll at a bridge or ferry.
- **II. Restrictive.** (The Limitation Acts, IX of 1871, XV of 1877).
  - (*a*) Suits. (Bengal Reg. III of 1793, sec. 14; Act XIV of 1859).
  - (*b*) Appeals.
  - (*c*) Applications.
- **III. Extinctive.**
  - Of rights *in rem*.
    - (*a*) Of rights of ownership of corporeal things. (Sec. 28 of Act XV of 1877).
      - Moveable.
      - Immoveable. (Sec. 29 of Act IX of 1871; sec. 34 of 3 and 4 Will. IV, c. 27).
    - (*b*) Of easements (sec. 47, Act V of 1882).
    - (*c*) Of other incorporeal rights.
  - Of substantive rights *in personam*.
    - (*a*) Rights to debts.
    - (*b*) Rights to unliquidated damages.

N.B.—Easements and profits being fragments or constituent parts of the full right of ownership, the prescription of such rights may be called 'constitutive prescription' as opposed to 'translatory or translative prescription,' which transfers the whole right of ownership. See Lindley's Thibaut, pp. 171—175.

Criminal *prosecutions*, as well as civil *suits*, may be the subject of restrictive prescription. In England a special limitation of three years is applicable to prosecutions for treason and misprision of treason. See 7 Wm. IV, ch. 3, sec. 5. As to offences punishable on summary conviction, see notes, Lecture II. The Calcutta Municipal Act II of 1888 (B.C.), sec. 419, requires complaints to be made within three months of the commission of offences under the Act.

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The several modes of operation of this law in British India.

In British India, the lapse of a definite period of time (under conditions determined by the law) operates in four ways:—

1. It restrains the holder of a right from enforcing his right by recourse to law; in other words, it bars his remedy by action or other active proceeding in Court. *Vide* section 4, Act XV of 1877.

2. It not only bars the remedy by action, of an owner of property who has been out of possession, but extinguishes his right to such property. *Vide* section 28, Act XV of 1877.

3. It extinguishes prescriptive and other easements, except where the easements are "necessary easements." *Vide* section 47, Act V of 1882, which originally applied to the Madras Presidency, the Central Provinces, and Coorg, and has now been extended to the Bombay Presidency, the North-Western Provinces, and Oude. (See Act 8 of 1891). Under sec. 62, cl. (*h*) of Act V of 1882, a *license* is deemed to be *revoked* by the lapse of a definite period of non-user.

4. It confers a right to light, air, way, watercourse, use of water, or other easement (from, over, or, upon another's land) on a person who has enjoyed it for the prescribed period. *Vide* section 26, Act XV of 1877, and section 15, Act V of 1882.

The first is 'limitation' properly so called, and is included in 'negative prescription' in its wider sense. The second and third fall under the head of 'extinctive prescription,' or of 'negative prescription' in its stricter sense. The fourth is a department of 'acquisitive or positive prescription.' (In the preceding tables, the term 'negative prescription' is used in its *wider* sense).

Positive (translative) prescription how far recognised. Bombay.

Of positive prescription of the *translative* kind, we had an instance in the Elphinstone Code. Bombay Regulation V of 1827, section 1, laid down that thirty years' adverse possession of immoveable property was to be deemed conclusive proof of proprietary right in the possessor, except in cases of fraud. Although this Regulation did not, in so many words, translate or transfer the right of the original owner of the property to the person in possession of it, it used distinct language to indicate that, when the thirty years had expired, the right of property should be regarded as vested in such person,* and Sir James Colvile, in giving the judgment of Her Majesty's Privy Council in

* Sitaram Vasudeva *v.* Khanderav Balkrishna, I. L. R., 1 Bom., 286, A. C.

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Mohanna Fatesanji v. *Desai Kalianrai*[6] did not hesitate to describe the first section of the Regulation as an enactment of positive prescription.[7]

In Bengal, it was held, even before the Limitation Acts of 1871 and 1877 came into operation, that a *twelve* years' possession of immoveable property by a wrong-doer extinguished the title of the rightful owner, and conferred a good title upon the wrong-doer.[8] But as Regulation III of 1793, section 14, and Act XIV of 1859, section I, clause 12, in terms limit the *suit* only, and as Act IX of 1871, section 29, and Act XV of 1877, section 28, *extinguish* the title only, and as none of them directly and avowedly transfers the right of ownership to the adverse holder, these sections, *strictly* speaking, are not laws of positive prescription.[9] Bengal.

Extinctive prescription how far recognised. (Property).

It should be also observed that the Indian law of limitation and prescription does not in terms extinguish any right other than the right to corporeal property and the right to easements. As to rights *in personam*, it has been held that a right to receive payment of a debt does subsist even after the remedy by action has been barred.[10] Such a right is, therefore, not a subject of extinctive prescription in British India. There is no ruling to the effect that a right to unliquidated damages arising out of a breach of a contract is extinguished by the Indian law of limitation, (Contracts).

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[6] L. R., 1 I. A., 34, 51; S. C., 21 W. R., 178, 181; 10 Bom., 281, 288.

[7] But when the Limitation Bill was discussed in Council in 1859, Mr. Peacock (afterwards Sir Barnes Peacock) was of opinion that the Bombay Regulation "did not enact a law of positive *prescription*, but only, for the most part, a rule of *evidence*." See the Proceedings of the Legislative Council of India for 1859, p. 54.

[8] Gossain Dass Chunder *v.* Isur Chunder Nath, I. L. R., 3 Calc., 224; Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, at p. 228, and the cases therein referred to. See also Golam Russool *v.* Mussamut Mughlo, 1 Moo. I. A., 446; and Khajah Enaitoollah *v.* Kishen Soonder, 8 W. R., 386; Raja Baroda Kant *v.* Prankristo, 12 W. R., 192; Rambhat *v.* The Collector, I. L. R., 1 Bom., 592. *Vide* note, p. 3, *supra*.

This, however, was not the rule in the Bombay Presidency, where they had a *thirty* years' rule of prescription, which was not repealed until 1871. (*Vide* section 2, Act IX of 1871, and Lecture III). In Madras, it has been held that Reg. II of 1802, and Act XIV of 1859, barred the remedy only. (Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175; Doe *v.* Kuppu Pillai, 1 Mad., 89).

[9] That is, they are not laws of positive prescription in its *direct* form. See Austin's Jurisprudence, by Campbell, Vol. I, p. 569, note. But *indirectly*, and *practically*, these laws *are* laws of positive translative prescription. (See note, p. 3, *supra*).

[10] Mohesh Lal *v.* Busunt Koeri, I. L. R., 6 Calc., 340; S. C., 7 C. L. R., 121, and the cases therein referred to. It has also been held that although a decree-holder's *application* for the ascertainment of the amount of mesne profits in execution is barred by limitation, (Torts).

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The theory now most prevalent in Europe is, that the bar of the action on a *personal* right and the extinction of the right are coincident.[1] Savigny, however, is of opinion that limitation leaves untouched the natural obligation or right. (See Poste, Gaius, pp. 194, 586; and p. 18, *infra*).

Prescription recognised by the ancients and the moderns in general.

Prescription in some form or other was recognised by the Athenians, the Romans, and the Hindus, but not by the Jews,[2] the Mahomedans,[3] and the ancient Scots.[4]

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his *right* to the mesne profits is not extinguished. (Anondo Kishore Dass *v.* Anondo Kishore Bose, I. L. R., 14 Calc., 50). This was a case of a right to unliquidated damages arising out of a *tort*.

(Theories about the extinction of *personal* rights).

[1] Valia Tamburatti *v.* Vira Rayan, I. L. R., 1 Mad., 228, *per* Holloway, J. The framers of the Limitation *Bills*, 1841–59, adopted this theory. See Lecture XI. It is said that, "wherever physical possession is possible, the right *to the thing* is distinguishable from the right of *action*. But in a claim on *contract* or *tort*, the law has not to choose *to whom* it will give the right, but whether it will give the right, and the right when given is good only against the contractor or tort-feasor. Here the right of action is the whole of the right, and when the action is gone, there is no obligation left." (Westlake's Private International Law, p. 251, Ed. of 1880). But it may be observed that even the inchoate right to *unliquidated* damages may be the subject of accord and satisfaction, and though such right is not fully ascertained till the damages are assessed by a Court of Justice, it is yet a substantial right, quite distinct from the action by which it is judicially enforced. (See Addison on Torts, p. 959, and Stephen's Commentaries, Bk. V, Ch. VII). Westlake's remarks, however, apply to an action by an informer for a penalty upon a statute. The informer has no right independent of his action. (See Darby and Bosanquet on the Statutes of Limitation, pp. 427-8). In an American case (Jones *v.* Jones), the Court say that the distinction between the effect of the statute as applied to *property* adversely held, and to *contracts* for the payment of money is this: that in the former case the statute acts on the *title*, and when the bar becomes perfect transfers it to the *adverse possessor*; while in the latter case there is *no adverse possession*, and the statute affects the *remedy* merely, and not the *debt*. (Buswell, p. 5).

[2] See Angell on the Limitations of Actions, sec. 8. By the Jewish law all lands not in the hands of the original owners were, with certain exceptions, restored to them in the jubilee year, which recurred every fiftieth year. (Lev. XXV, 20). Debts were remitted at the jubilee.

[3] See Macnaughten's Principles and Precedents of Mahomedan Law, p. 76, Ch. XV, sec. 5. See also Gobind *v.* Inayat, I. L. R., 7 All., 775, at p. 811. In the Bhaurayik an opinion is cited from the Mabsut, to the effect, that if a person causelessly neglect to advance his claim for a period of thirty-three years, it shall not be cognizable in a Court of Justice; but this opinion is opposed to the legal doctrine. Even as to the right of pre-emption, according to Abu Hanifa and one tradition of Abu Yusof, there is no limitation as to time. This rule is maintained in the Fatwa Alamgiri and in the Hedaya, and it seems to be the most authentic and generally prevalent doctrine. (Bourke's Indian Law of Limitation, 3rd Ed., pp. 6-7; Mahamud Danish *v.* Choora Gazee, Cal. S. D., 1851, p. 292).

[4] Lord Stair, in his Institutions (Bk. II, tit. 12), says: "Prescription had no place in the old customs of Scotland."

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In modern times, the doctrine has been adopted to some extent or other by almost all civilized nations, although, as observed by Sir Henry Maine,[5] the moderns (specially those whose jurisprudence is not based on the Roman law) have been loath to carry it to its legitimate consequences. Thus, in England, legislation long declined to advance beyond the imperfect device of barring actions for the recovery of land or other real property, when the cause of action had taken place earlier than a *fixed point* of time, such as the commencement of the reign of Henry I, the return of King John from Ireland, and the coronation of Richard I. It was not until the 32nd year of Henry VIII (1540) as to real actions, and the 21st year of James I (1623) as to personal actions, that the English people obtained statutes which fixed certain (in lieu of daily increasing) periods of limitation "both for the time present and for all times to come." The Statute of James I, as well as the Statute of Henry VIII barred the remedy,[6] but did not expressly extinguish the right. The Statute of William IV (passed in 1834) avowedly extinguishes the right as to real property after twenty[7] years' adverse possession, but it does not even in that case *expressly* or *directly* transfer the right to the adverse holder. In British India, an express law for the acquisition by prescription of ownership in corporeal property was attempted to be introduced by Sir James Colvile in 1859, and by Sir James Fitz James Stephen in 1871, but Act XIV of 1859 and Act IX of 1871 were passed only after the clauses relating to such acquisition had been expunged from the Bills as introduced.[8] The Act of 1871, however, contained an extinctive clause similar to that in the Statute of William IV. The last Limitation Act (XV of 1877) extends the rule of extinctive prescription to moveable property, but even this does not contain any express law of translative prescription.[9]

The slow progress of the doctrine in England and British India.

The Athenian laws in general prohibited all actions where the wrong had been committed six years before the institution

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[5] Maine's Ancient Law, pp. 284-285.

[6] So far as the title to *land* was concerned, these statutes of limitation were *construed* as laws of *prescription*, *i.e.*, they were treated *practically* as laws of *prescription*. See note, p. 3, *supra*. (Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, at p. 229).

[7] The 37 and 38 Vict., c. 57, which came into operation in 1879, reduces the *period* of limitation to twelve years, and so far assimilates the law of England to that of British India.

[8] See Lect. XI.

[9] The 2 and 3 Will. IV, c. 71 (passed in 1832), and Acts IX of 1871 and XV of 1877, enact rules of *constitutive* prescription, *viz.*, rules for the acquisition of *easements*. Usucapion or translative prescription has never been fully received into the English or the Indian law. See Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, at p. 229.

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The law of the Romans.

thereof."[10] Instances of all sorts of prescription, whether acquisitive, extinctive, or restrictive, are to be found in the Roman law, which is the basis of several modern systems of law. The principle of positive or acquisitive prescription was recognised under the name of *usucapio*, and the doctrine of restrictive prescription or limitation under the name of *præscriptio*[1] or *exceptio*. The extinction of servitudes by long non-user, and the extinction of the obligation or right by lapse of time in the case of personal actions, supplied instances of extinctive prescription. The *usucapio*, however, was an earlier institution than *præscriptio*.

Old law of usucapio.

Under the old Roman law, a person who, by purchase, gift, or any other legal means, obtained a thing from one who was not the owner, but whom he *deemed* so, acquired by use (*usucapio*) a title to such thing; provided that in the case of moveable property he had been in possession for the space of one year either in Italy or the Provinces; and for the space of two years, in the case of immoveable property, but only if held within the limits of Italy.[2] The same rule was also applied to cases in which *bonâ fide* possession originated in an *informal* mode of acquisition.[3]

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[10] Angell, sec. 8. Blackstone says, the period was *five* years. See Stephen's Commentaries, Bk. V, Ch. IX.

[1] The limitation of actions was called *præscriptio temporis*, or *annalis*, or *longi temporis* (Ortolan's Roman Law by Mears, p. 345); or *temporalis præscriptio*, or *exceptio temporalis* (Poste's Commentary on Gaius, 2nd Ed., pp. 194, 585).

Præscriptio.

Præscriptio was so called because the objection of limitation was *written before*, that is, placed at the beginning of the directions which the *Magistratus* (judge of questions of law) sent to the *Judex* (judge of questions of fact) for the purpose of limiting the enquiry. (Sandar's Justinian, Introduction).

Before the time of Justinian, *præscriptio* meant limitation. In the time of Justinian, the term denoted both limitation and usucapion. (See Markby, 3rd Ed., sec. 551). The present use of the term prescription is un-Roman. That which was known to the Romans as usucapion has descended to *modern* jurisprudence under the name of prescription. (Maine's Ancient Law, 284).

[2] Grapel's Justinian, Bk. II, tit. 6.

[3] Moyle, Justinian, pp. 187, 216. Under the (old) Roman law (which did not apply to lands in the Provinces out of Italy), where a *bonâ fide* possessor had acquired a *res mancipi*, something *corporeal* in its nature, by tradition or any other *inappropriate form* of transfer, and had possessed the same for two years in the case of immoveables, or for one year in the case of moveables, what was called *quiritarian* ownership, was the result. The office which *usucapion* performed for *res mancipi* was (in later times), in a measure, performed for *res nec mancipi* (for Provincial lands, and things *incorporeal* in their nature), by *prescription* (and *longi temporis consuetudo*), though the period required was a longer one, and the ownership took the name of *Bonitarian*. (See Washburn, 4th Ed., p. 124; and note 5, *infra*). *Usucapio* and *prescriptio* thus differed from

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Prætorian law. (Ten years' possession, just title, and good faith).

The exclusion of provincial soil from the operation of *usucapio* induced the prætors to introduce the *longi temporis præscriptio*. By this, if a man possessed provincial land for ten years (or twenty, if the owner lived out of the province), and if such possession was accompanied by a just cause or title and *bonâ fides*,[4] the owner's action for its recovery could, after the lapse of that period, be *repelled* by a plea called originally *præscriptio*, and latterly, *exceptio*. It operated at first as a statute of limitation, but eventually it transferred the ownership to the possessor.[5]

Justinian. Justinian reformed the old law. For moveables, he extended the period from one year to three years: for immoveables, he abolished the distinction between Italian and Provincial soil, and made *longi temporis præscriptio* the universal mode of usucapion for *immoveables*.[6]

(Thirty years' possession, and good faith).

There was also a prescription termed *longissimi temporis præscriptio*, which applied both to moveables and immoveables. If there was a possession for thirty years (or in the case of ecclesiastical property for forty years), whatever obstacle there might be to the acquisition by ordinary *usucapio* (for instance, theft, violence, absence of a just title or of *bonâ fides*), the possessor could *repel actions* brought to claim the thing.[7] Under Justinian, the *longissimi temporis præscriptio* became a new or extraordinary mode of usucapion, provided there was *bonâ fides* in the commencement of possession. This condition of *bonâ fides* was not attached to limitation or *temporalis præscriptio*.[8]

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each other, (1) in the things acquired; (2) in the time; (3) in the effect. Justinian abolished these distinctions, and prescription now comprehends both terms. (Buswell, p. 2).

Just title and good faith.

[4] By the requirement of a just cause or a just title is meant that the possessor must have got possession in some way which would have made him owner, but owing to the conveyance being defective in form, or to some vice in the donor, or the donee, or the thing itself, acquisition of possession is not equivalent to acquisition of ownership. By *bonâ fides* is meant ignorance, occasioned by excusable error, of the vice of the acquisition, *e.g.*, ignorance of the fact that the vendor is not the owner. By the Roman law, *bonâ fides* was required only at the *inception* of possession; under the canon law and the modern civil law, there must be *bonâ fides* during the whole period of prescription. (Moyle, Justinian, pp. 187, 216, 217; Mears, Ortolon, pp. 166, 167; Poste, Gaius, pp. 192, 193). See note, p. 24, *infra*.

[5] Moyle, Justinian, p. 217; Poste, Gaius, p. 581. Even before the time of Justinian, the party who could plead *præscriptio* as a bar to the *action*, in many cases, *practically* got the benefit of *usucapio*, though the ownership thus acquired was only a sort of equitable ownership. Justinian abolished the distinction between legal (or *quiritarian*) and equitable (or *bonitarian*) ownership. (Markby, 3rd Ed., sec. 551).

[6] Poste, Gaius, pp. 192, 193, 581.

[7] Sandar, Justinian, pp. 236, 237.

[8] Poste, Gaius, pp. 193, 194, 581. See Lect. VI.—"Knavish possession."

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Limitation.

Originally, all rights of action were unlimited in duration; afterwards the prætors limited the right of bringing some of the new actions which they introduced to the period of one year from the date of the cause of action. Subsequently, the *longi temporis præscriptio* was introduced in suits relating to land. Constantine introduced a thirty years' *præscriptio*, and ordained that an owner should lose his right of *action* after thirty years' possession without either a just title or *bonâ fides* on the part of the possessor. This thirty years' *præscriptio* was afterwards extended to personal actions for compensation, &c.[9] Justinian ordained that thirty years' possession *without just title*, but accompanied with *bonâ fides*, should transfer *ownership* to the possessor, and be treated as an *extraordinary* mode of *usucapion*. He also ordained that thirty years' possession *not* accompanied with *bonâ fides* should operate, not as *usucapion*, but *merely* as *limitation*.[10] In actions for the recovery of *property*, *limitation* had thus the weaker operation of barring the remedy but not extinguishing the right. Vangerow, in opposition to Savigny, holds that limitation in *personal* actions for compensation, &c., had the stronger operation of extinguishing the right itself.[1]

Thirty years' possession without good faith.

Personal actions.

It is now very commonly held that, though rural discontinuous servitudes could never be acquired by *usucapio* which presupposed continued possession, urban servitudes, which were in their nature continuous, could be so acquired. The Lex Scribonia (A. U. C., 720; B. C., 33), however, abolished the usucapion of urban servitudes.[2] *Usucapio*, therefore, became inapplicable to the acquisition of any class of servitudes. But the jurists and the prætors recognised the establishment of all kinds of servitudes by *longa quasi possessio*, or *longæ temporis consuetudo*. This differed from *usucapio* and *longi temporis præscriptio* by not requiring either a just title or *bonâ fides*.[3] Uninterrupted enjoyment for ten years, if the owner of the servient heritage was domiciled in the same province, and for twenty years, if he was domiciled in another, conferred the right; provided such enjoyment was *nec vi*, *nec clam*, and *nec precario*, *i.e.*, provided such enjoyment was neither violent,

Acquisition of easements.

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[9] Poste, Gaius, p. 581.

[10] Poste, Gaius, p. 581.

[1] Poste, Gaius, p. 586. See p. 14, *supra*.

[2] Moyle, Justinian, p. 209; Mears, Ortolan, pp. 157, 159.

[3] Poste, Gaius, pp. 194, 582; Moyle, Justinian, p. 209. See Lord Blackburn's judgment in Dalton *v.* Angus, 6 App. Cas., 740, at p. 819. Dr. Markby, however, says that the Roman law admitted (as an exceptional case) the acquisition by prescription without just title of certain *special* rights only. (Markby, 3rd Ed., sec. 567).

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nor secret, nor in virtue of permission from him. Whether any acquisition of *servitudes* on *less* stringent terms, corresponding to *longissimi temporis præscriptio* in the case of *property*, was ever recognised is not certain.[3a]

Under Justinian, ten years' non-user, for persons present in the same province (*inter presentes*), and twenty years' non-user, for persons absent (*inter absentes*), extinguished servitudes. For the loss of an urban servitude, however, in addition to non-user on the part of the dominant owner, it was necessary that the servient owner should positively use the servient heritage in such a manner that the servitude *could not possibly* be exercised, *e.g.*, in the case of a servitude of light, by erecting a wall in front of the dominant window. The dominant owner *lost* not only his right of *action* but the *easement itself* by *longi temporis consuetudo*; and limitation as opposed to *usucapio* had no existence in the sphere of servitudes.[4] Extinction of easement.

The following are some of the texts which relate to prescription and limitation under the Hindu law:— The Hindu law.

(*a*). "He who *sees* his land possessed by a *stranger* for twenty years, or his personal estate for ten years, without asserting his own right, loses his property in them—except pledges, boundaries, sealed deposits, the wealth of idiots and infants, things amicably lent for use, and the property of a king, a woman, or a priest versed in holy writ."—Yajnyawalcya.[5] Yajnyawalcya.

(*b*). "Occupancy during twenty years, unmolested by the owner, is considered as possession of land during one generation; twice as much during two; thrice as much during three; and in this instance proof of a fair title is not required."—Vyasa.[6] Vyasa.

[3a] Poste, Gaius, p. 582. *Vide* p. 17, *supra*.

[4] Moyle, Justinian, p. 210; Poste, Gaius, pp. 582, 583. Cf Sec. 47, Act V of 1882.

[5] See Colebrooke's Digest, Ed. of 1797, Vol. I, p. 190. On a Bombay case decided in 1807, Mr. Colebrooke remarks: "Certainly ten years is the shortest limit of action known to the Hindu law," and this remark is assented to by Mr. Ellis. See 2 (Strange's Hindu Law, 465).

Sir Thomas Strange erroneously treats this text of Yajnyawalcya as an authority for the conclusion that "the period within which an *action* must be brought for the recovery of a *debt* is ten years." (See Beer Chand Poddar *v.* Roma Nath Tagore, Taylor and Bell, 131).

[6] See Colebrooke's Digest, Vol. IV, p. 143. Raghunandan commenting on this text of Vyasa, says: "This precept relating to usucapion in the *absence* of the proprietor, does not contradict the texts relating to adverse possession during twenty years in the *presence* of the owner." Colebrooke's Digest, Vol. IV, p. 144). Compare text (*g*).

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Vrihaspati.

(*c*). "A possession by *strangers* for three generations gives no doubt an absolute title; not a possession by *kinsmen* within the degree of *sapindas;* the property of a house, arable land, a market or other immoveables, which are possessed by a friend or a near kinsman in the male or female line, who is not the proprietor, shall not be lost to the rightful owner. Nor shall the husbands of daughters, nor learned priests, nor the king, nor his ministers, acquire a title even by a very long and quiet possession."—Vrihaspati.[7]

Narada.

(*d*). "The *suit* does not prosper after the expiration of the limited period of a person practising indifference and remaining silent."—Narada quoted in the Mitakshara, chap. iii, sec. 3.[8]

Manu.

(*e*). "If he be neither an idiot, nor an infant under the full age of 15 years, and if the chattel be adversely possessed in a place where he may see it, his property in it is extinct by law, and the adverse possessor shall keep it."—Manu.[9]

Catyayana.

(*f*). "In cases extending beyond the memory of man the hereditary succession of three ancestors is admitted (as evidence of landed property) even without a title."—Catyayana quoted in the Mitakshara, chap. iii, sec. 5.[10]

The Mitakshara.

(*g*). "Possession for upwards of a hundred years, hereditary, uninterrupted, and falling under the observation of the adverse party, confers a right, as it forms a presumption of, from its conformity with, a title."—Mitakshara, chap. iii, sec. 5.[1]

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[7] See Colebrooke's Digest, Vol. IV, p. 144.

[8] See Macnaughten's Principles and Precedents, Vol. I, p. 203.

[9] *Ibid.*, Vol. I, p. 204.

[10] Macnaughten's Principles and Precedents, Vol. I, pp. 213-4. The extreme age of man, according to the Vedas, being 100 years, the period of 100 years is "within the memory of man."—*Ibid.*

[1] *Ibid.*, p. 214. The presumption appears to be a rebuttable one, for although, according to the Mitakshara, it arises where there is no demonstrable title, it does not arise where there is *proof* of *absence* of title.—*Ibid.* Narada (quoted in the Mitakshara, chap. iii, sec. 3) declares: "He who enjoys without a title even for many hundred years,—the ruler of the earth should inflict on that sinner the *punishment* of a thief." (See Macnaughten, Vol. I, p. 202. This *sloka* is attributed to Manu by Colebrooke. See 2 Strange's Hindu Law, pp. 20-21). Cf. Domat, para. 2182. It would appear that, according to the Mitakshara, the *first* intruder who asserts possession, *without mention of title*, is punishable,—not his son or grandson. (See Montriou's Institutes of Jurisprudence, pp. 183, 184). Vijnanesvara attempts to reconcile this text of Narada, so far as it relates to the first intruder, with that of Yajnyawalcya, by holding that if the *produce* of the property is not forthcoming, but has been consumed or destroyed, it shall not be recovered after the twenty years; but the property itself may be recovered at any time, if it can be *proved* that

Intrusion *without* mention of title. Narada.

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(*h*). "In immoveable property obtained by an equitable partition or by purchase, or inherited from the father, or received from the king, a title is gained by long possession and lost by silent neglect. Even in property simply obtained (with or without a fair title), which a man has accepted and quietly possessed unmolested by another, he acquires a title, and in like manner he forfeits one by (silent) neglect."—Vrihaspati quoted in Colebrooke's Digest, Vol. IV, p. 332, verse 384.[2] Vrihaspati.

Forms of prescription recoguised.

The text of Narada (*d*) appears to recognise the principle of Restrictive Prescription or Limitation. The text of Yajnyawalcya (*a*) upholds the rule of Extinctive Prescription as regards moveable and immoveable property. The texts of Vyasa, (*b*)—Vrihaspati, (*c*) and (*h*)—Manu, (*e*)—Catyayana, (*f*)—and Vijnanesvara, (*g*), sanction the doctrine of acquisitive prescription in respect of corporeal property. The Mitakshara does not clearly distinguish prescription from the doctrine of presumption.

Bombay Sudder Dewany Adawlat.

The Hindu Law of Prescription, so far as it affects immoveable property, is thus summarized in the case of *Sayud Ghoolam Ruza* v. *Aja Bhaee and others*:[3] "If the owner of real property, whether land or other, allow another to hold it for three generations under any deed, without claiming it, such property becomes lost to him, and ownership accrues to the person in possession. But as three generations may lapse in two or three years, it is provided by the *Shastras* that the actual possessor's ownership shall ensue if the property has been held for any time after the *smartha kal* (the memory of man). In the Mistakshara this *smartha kal* is fixed at 100 years; however, Catyayana and Vyasa state sixty years as the time when three generations may be said to have passed over, and

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the adverse holder had *no right* to the property, *i.e.*, had not legally acquired it. (Macnaughten's Principles and Precedents, Vol. II, pp. 205, 206. See also Tagore Law Lectures, 1885, pp. 269 *et seq*). The Vyabahara Mayukha (Chap. II, sec. 2, Mandalik's Translation, p. 21), says: This text of Narada is applicable to cases where the memory of a want of title is handed down by tradition, *i.e.*, where there is proof of absence of title. Vattel takes a similar view of immemorial prescription, where he says that it affords a legal presumption "*as long as* the adverse party *fails* to adduce substantial reasons in support of his claim." (Law of Nations, Bk. II, Ch. XI). Jagannath and Raghunandan, of Bengal, do not seem to take notice of this text of Narada.

[2] According to Jagannath Tarkapanchanan even a *notorious* fair title, *i.e.*, a title accompanied by possession, may be lost by subsequent dispossession for twenty years, &c. The other portion of this text of Vrihaspati would seem to apply where the holder of the title never obtains possession.

[3] Borradaile's Reports, p. 367 (Bombay Sudder Dewany Adawlat).

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after which the claim of the original proprietor is null under any plea."

Table of analogous provisions.

The following is a tabular statement of some of the provisions of the Hindu Law of Prescription as to land, with their analogues in some other well-known system or systems:—

Period of prescription *inter presentes*, shorter than the period of prescription *inter absentes*.	Texts (*a*) and (*b*) as interpreted by the Bengal lawyer Raghunandan. (The Mitakshara does not admit any prescriptive right in the absence of the adverse party).	Justinian's Institutes, Bk. II, tit. 6. The English law exception (before 1879) in case of plaintiff's absence beyond seas. 3 & 4 Will. IV, c. 27, secs. 16, 19.
Distinction between possession with and without a fair title.	Text (*b*) and text (*A*).	The *prescriptio longi* and *longissimi temporis* of the Romans. Article 2262 of the Code Napoleon. Beng. Reg. II of 1805, sec. 3.
Right to land extinguished after twenty years' adverse possession.	Text (*a*) as interpreted by the Bengal School.	3 & 4 Will. IV, c. 37, sec. 34. (The period has been reduced to twelve years by 37 & 38 Vict., c. 57).
Exception in favor of pledges and deposits.	Text (*a*) ...	Beng. Reg. II of 1805, sec. 3, cl. 4. (This has been modified by the Indian Limitation Acts of 1859, 1871 and 1877).
Exception in favor of infants, idiots, and women.	Texts (*a*) and (*e*) ...	3 & 4 Will. IV, c. 27, sec. 16. Sec. 11, Act XIV of 1859. (Under the old Roman law, as under the Hindu law, women were always under tutelage. In England, married women only are within the exception).
Exception in favor of the king and the priest.	Text (*a*) ... (Under Hindu law the king and the priest were also *precluded* from taking *advantage* of the rule of prescription).	The maxim *nullum tempus occurrit regi aut ecclesiæ*, which was not abrogated in England as to the crown, until 1623 and 1769, and as to the clergy until 1834.
Exception against friends and kinsmen.	Texts (*a*) and (*e*) ...	The principle that trustees and persons holding permissively cannot prescribe against the owner, recognised by the English and Indian law.

Sir William Jones on the Mitakshara.

Sir William Jones, in a letter to the Governor of Bombay, writes: "The doctrine of the Mitakshara is, that an absolute property may be acquired in law by continued and undisputed possession for twenty years in the *presence* of the owner, provided that the possessor came in by a fair title, either by descent or by purchase; if he had no fair title, the intermediate profits only are irrecoverable, but the property is not lost." And he concludes: "I only add for your further satisfaction, that if three descenst

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have happened since the first possession without a fair title, the property is lost, even though the owner was *absent*; but if three descents have not been cast, an adverse possession for a hundred years gives an absolute property in the land to the possessor, unless the owner was under some legal disability."[4]

Colebrooke's remarks on this subject are more accurate. He says:[5] "Vijnanesvara, after a long argument, rules that it is the *perishable produce* only of land that cannot be recovered after the expiration of twenty years, and of other property after ten years, such land or other property having been enjoyed to the exclusion of the owner by his default or in his view. With regard to land he holds, that if legal acquisition can be *disproved* even after the expiration of a hundred years (considered as the measure of the life of man) ownership is not established by possession, and he accordingly declares that 'even beyond the period of memory, if there exist a current tradition of the illegality of the acquisition, the enjoyment is not valid.' And it is observable that, to render it so in any case, it must have been in view of the owner. In fact, according to the original and correct doctrine of the Hindu law, enjoyment or possession can never be cause of ownership, it is a presumption of it only; but if the want of original title can be shown, the possessory holder may at any time be divested of the property. This applies not merely to land but to property of every description." Colebrooke on the same subject.

The preamble to Bengal Regulation II of 1805 recites that, under the Hindu law, a sixty[6] years' prescription is applied to private rights and claims, in cases of unmolested possession, unless there be proof of a bad title; and that the distinction between *bonâ fide* possession under a title believed by the possessor to be good and sufficient, and *mala fide* possession obtained by fraud or violence, has been taken in the Hindu law, as in the laws of other countries, wherein long and peaceable possession is held and admitted to establish a right of possession and property. Beng. Reg. II of 1805.

Sir Thomas Strange distinctly asserts that for the recovery of debts or other personal matters, actions must be brought within ten years, but it has been held that all Sir T. Strange.

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[4] See the Indian Law of Limitation, by W. M. Bourke, 3rd Ed., Appendix, p. xvi, where these passages are quoted from the official notes of Sir Robert Chamber, C. J.

[5] See 2 Strange, p. 20.

[6] By the Hindu law, no process could be instituted for the possession of land after three generations or sixty years. (3 Colebrooke, Hindu Law, 443, referred to in Buswell on Limitations, p. 7).

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the texts quoted by him refer to adverse occupation of a thing *capable of occupancy*, and have no application to debts. "No prescription of the right, nor yet of the remedy in such cases, in derivable from the authority of any text-writer on the Hindu law."[7]

Dr. Markby. "The Mistakshara lawyers," says Dr. Markby in his Elements of Law (2nd Ed., Appendix B, p. 267; 3rd Ed., p. 290), "would, I think, only have allowed twenty years' possession to cure a defect of title, if the party held under a title which was just.[8] Jagannath, on the other hand, as understood by Colebrooke, dispenses with the requirement of a just title, but there he does not give any fixed period for the acquisition of ownership, which would probably, therefore, be *shortened* in favor of the *honest* purchaser. There is much to be said in favor of the good sense and justice of the rule which gives ownership to the person in possession after a certain period in all cases, but shortens that period in favor of those who have got into possession in good faith, though on a defective title.[9] This was the Roman law, and is the prevailing law of Continental Europe; and the rule of Hindu law, as recognised and applied by the more enlightened school, did not probably differ materially from it. The objection to the English law is, that it does not take sufficient notice of the distinction between a holding by wrong and a holding under a defective title, but gives the same fixed period of prescription for nearly all cases."[10]

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[7] Beer Chand Poddar *v.* Romanath Tagore, Taylor and Bell, p. 131 (1849), Calcutta Supreme Court.

[8] This, however, is not quite accurate. See text (*g*), and the notes to it, p. 20, *supra*.

[9] But according to Bentham, *no time*, however long, ought to give a title where the possession is *dishonestly* obtained. (Markby, 3rd Ed., p. 290). Compare the text of Narada in note 1, p. 20, *supra*.

[10] Usucapion or translative prescription has never been fully received into the English or the Indian law. In England, as well as in British India, there is no express law of positive prescription, in its *direct* form, for the acquisition of ownership in *corporeal* property. This is probably the reason why the general rule of jurisprudence, that ownership in corporeal property, may be directly acquired by long possession "if the possessor has acted *bonâ fide* and obtained possession on a just cause, *i.e.*, under color of right, as a transferee, legatee, or otherwise" is not recognised by the English or the present Indian law. (See Markby, 3rd Ed., secs. 560 and 589).

The acquisition of (at least, *certain*) *easements*, by prescription *without just title*, was recognised even by the Roman law. All easements may be acquired by prescription, *without* just title, in England as well as in British India. See pp. 17, 18, *supra*.

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LECTURE II.

THE REASON AND THE OBJECT OF THE LAW OF LIMITATION AND PRESCRIPTION, AND THE CLASS OF LAWS TO WHICH IT BELONGS.

Reasons of public policy—The quieting of titles, &c.—*Interest reipublicæ ut sit finis litium*—The perishable nature of man and all that belongs to him renders limitation necessary—This law—a means of ensuring *private* justice as well—Occasional injustice how justified—*Vigilantibus, non dormientibus jura subveniunt*—The theory of laches or acquiescence—The true foundation of prescription—public utility and convenience—The theory of satisfaction or release—Different laws in different countries, and in different times—The principle on which the length of the periods of prescription is determined—According to Vattel the law of limitation and prescription is a part of the law of nature and the voluntary law of nations—According to Lord Stair, it is a positive law—According to Thibaut, it is *jus singulare*—Lord Blackburn follows Lord Stair—The law of limitation and prescription is public law, as opposed to provisional law—Laws of prescription and limitation are general private laws, substantive and adjective—The law of limitation a *lex fori*—The *lex fori* preferred to foreign law in matters of procedure—The same rule applies whether the foreign law allows a shorter or a longer period—The conditions on which a foreign law of limitation may be preferred to the *lex fori*—Limitation is not "of the nature of the contract"—Otherwise, when the bar extinguishes the right—When the *lex fori* and the *lex loci contractus* are both applicable—The personal law of the Hindus and Mahomedans yield to the *lex fori*—English and native calendars.

Reasons of public policy.

THE main consideration on which the doctrine of 'limitation and prescription' is founded is *public policy*. "Usucapion," says Gaius (Digest, Bk. XLI, tit. 3, art. 1), "was introduced for the public good, *viz.*, lest ownership of sundry things be left uncertain for a long time and often for ever: seeing that a fixed period would suffice for the diligence of owners." The reason of the rule of usucapion, according to Justinian, is "the *inexpediency* of allowing ownership to be long unascertained." "Prescription," said Wayne, J., "is a thing of policy growing out of the experience of its necessity."[1] "Prescription," wrote Lord Stair (Institutions, Bk. II, tit. 12, s. 9) "is founded upon utility more than upon equity."

The quieting of titles, &c.

To secure the quiet and repose of the community, it is necessary that the title to property, and matters of right in general, should not be in a state of constant uncertainty, doubt and

[1] See Story's Conflict of Laws, paragraph 582*a*.

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suspense.[a] The law of limitation and prescription prevents this uncertainty. It not only quiets disputes between individuals, but in the interests of the public declares that the possession of property for a certain length of time is directly or indirectly a good title. A person who has been long in possession acquires a credit which is attributable to such possession, and it is of great importance to the public that his possession should not be lightly disturbed.[b]

Unlimited and perpetual litigation disturb the peace of society and lead to disorder and confusion. A constant dread of judicial process and a feeling of insecurity retard the growth or prosperity of a nation, and labor is paralysed when the enjoyment of its fruits is uncertain.[c] Moreover where stale claims leave the Courts little or no time to attend promptly to more recent and urgent cases, creditors and injured parties in general are led to suspect the readiness of the State to enforce their rights. It is therefore expedient that the possibilities of litigation should be limited and restricted. The old maxim of law is *Interest republicæ ut sit finis litium.*[d] The interests of the State require that a period should be put to litigation.

Interest reipublicæ ut sit finis litium.

The law of limitation and prescription prescribes this limit. It prevents persons from enforcing their own rights, and disputing the rights of others, after a certain period of time, and thus quiets titles, facilitates transfers,[e] and

(Transfers facilitated).

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[a] Puffendorf, Bk. IV, chap. 12, sec. 6. The doctrine of the law is that the dominion of things must not long remain uncertain, so as to disturb the peace of soceity by giving rise to numerous and perpetual litigations; and that, to prevent such serious evil, the laches of those who are dilatory in pursuing their just remedies, should be punished, and that those who are indolent shall impute to themselves the punishment. (Domat's Civil Law, L. 8, T. 7, sec. 4).

[b] See Brown on the Law of Limitation as to Real Property, p. 14. Professor Amos, in his Systematic View of the Science of Jurisprudence (p. 346) mentions the following as one of the grounds on which the doctrine of prescription is based: "The expediency of not disturbing the existing state of things in view of public expectation being based on their continuance, and not on their disturbance."

Expediency of not disturbing possession.

Prescription is "conducive to the *public* security and the quieting of disputes."—Bom. Reg. V of 1827, preamble.

The object of the Legislature in passing statutes of limitation is to quiet long possession and to extinguish stale demands. (Luchmeebux v. Runjeetram, 20 W. R., 375, P. C.)

[c] See Angell on Limitations, s. 9.

[d] See Ruckmabye v. Lulloobhoy, 5 Moo. I. A., p. 234.

The admission of a proprietary right grounded upon the mere efflux of time is intended to give *security* to property and to *diminish litigation.* (Hall's International Law, p. 111).

[e] This law enables us, at least partially, "to abridge the length of abstracts and to simplify the deduction of titles." Banning, p. 4.

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enhances the value of property. It enables men to reckon upon security from further claim and to act upon it.[7]

The perishable nature of man and all that belongs to him renders limitation necessary.

The necessity for putting a limit to litigation arises also from "the perishable nature of man and all that belongs to him."[8] It has been said by John Voet that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal.[9] The death of parties and witnesses, the loss or destruction of documents, and the fading of memory, in the course of time, render such a limit highly expedient. "Time," said Lord Plunkett, Lord Chancellor of Ireland, "holds in one hand a scythe, in the other an hour-glass. The scythe mows down the evidence of our rights, the hour-glass measures the period which renders that evidence superfluous."[10] The law of limitation and prescription "repairs the injuries committed by time," and ensures justice by supplying the deficiency of proof.

(Injurious effects of time removed).

This law—a means of ensuring *private justice* as well.

A statute of limitation and prescription is not only a statute of *public* peace and repose, but it is at the same time a means of ensuring *private* justice, suppressing fraud and perjury, quickening diligence, and preventing oppression.[1] It is unfair to call upon a person to defend an action at a time when his muniments of title, acquittances or other documents are (very likely) lost or destroyed, and when he cannot be expected to produce the witnesses necessary to support his case or to meet the charge made against him.[2] If claims might be postponed to an indefinite period, the Courts would have the utmost difficulty in ascertaining the truth of facts, and in confuting fraud and perjury.[3] Experience shows that fraud and perjury have a better chance of success, when the staleness of the claim renders the preservation of the evidence relating to it less probable.[4] Justice to the defendant requires that the plaintiff's want of diligence should be discouraged as much as possible. It is extremely hard to dispossess parties who have long been in quiet enjoyment of property, unconscious of any defect of title, and with habits and plans of life influenced by the income

(Oppression prevented).

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[7] *Per* Markby, J., in Krishna Mohun Bose *v.* Okhil Money Dassi, I. L. R., 3 Calc., 331.

[8] Phillimore's Private Roman Law, p. 125.

[9] See Story's Conflict of Laws, Title, *Prescription*; and Brown on Limitation, p. 10.

[10] See Dr. Stoke's Speech in the Legislative Council, 19th July 1877.

[1] Story's Conflict of Laws, s. 576; see also White *v.* Paruthers, 1 Knapp's Privy Council Reports, pp. 179, 227.

[2] See Battley *v.* Faulkner, 3 Barn. and Ald., 288, 293. See also Chhaganlal *v.* Bapubhae, I. L. R., 5 Bom., 68, 72.

[3] Westlake's Private International Law, Ed. of 1880, p. 252.

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which the property produces.[a] And to enforce the payment of a debt, which time and misfortune have rendered the debtor unable to discharge, and which he was led to believe would never be demanded, savours more of cruelty than of justice.[b]

Occasional injustice how justified.

But does the law ensure justice in every case? Does it not, on the other hand, offer a premium to persistence in wrong? The answer to these questions is, that the law aims at the *greatest good* of the *greatest number*, and "is based on that compromise between occasional wrong and general right which is inseparable from the condition of a finite being."[c] The legitimate object of the law is not to favor usurpers or to enable debtors to escape payment of their debts, but to quiet long continued possession, and to protect persons who have long enjoyed a right or an immunity, from being harassed by stale demands. The law designs to protect these persons from claims brought forward against them at a period when it might be presumed from the lapse of time that the claims are either fictitious or that they had been satisfied or abandoned. Honest parties, who have not really abandoned their claims, may sometimes suffer loss by reason of this law, but it is nevertheless expedient that the general good of the community should be purchased at the expense of some individual hardship. It is better perhaps that occasional injustice should be permitted than to run the risk of doing greater injustice by entering into the consideration of transactions, which the distance of time may perhaps render incapable of a satisfactory explanation.[d] This individual mischief is further justified on the ground that a party who is insensible to the value of civil remedies, and who, tacitly acquiescing in the conduct of his opponent, does not assert his own claim with promptitude, has little or no right to require the aid of the State in enforcing it.[e] *Vigilantibus, non dormientibus jura*

Vigilantibus, non dormientibus jura subveniunt.

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[a] White v. Paruthers, 1 Knapp's Privy Council Reports, pp. 179, 227.

[b] A'Court v. Cross, 3 Bing. R., 329.

"The principle on which the law (of limitation as to debts) has always been based is either actual satisfaction, or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay." (*Per* Jessel, M. R., in Sutton v. Sutton, 22 Ch. Div., 511).

Many of the *subsidiary* reasons urged in support of the doctrine of prescription apply with full force to "prescription of *long* standing" only.

[c] Phillimore's Private Roman Law, p. 126.

[d] *Per* Richards, C. B., see Brown on Limitation, p. 12.

[e] See Montriou's Institutes, p. 174; White *v.* Paruthers, 1 Knapp's Rep., 179; and Adam v. Earl of Sandwich, 2 Q. B. Div., 489.

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subveniunt. The law assists the vigilant, not those who sleep over their rights. Lord Blackburn, in a recent case,[10] points out that this ground of acquiescence or laches is often spoken of as if it were the *only* ground on which prescription was or could be founded.[9] But the weight of authority in England and in other systems of jurisprudence shows that the principle on which prescription is founded is *more extensive.*[10] No doubt it seems far less hard to say that enjoyment for a prescribed time shall bar the right-holder, when he has been *guilty of laches*, than to say that he shall lose his right if he has not

The theory of laches or acquiescence.

"Although," as Puffendorf observes, "the *principal* aim of the law is *not* to punish men's defaults," the effect and consequence of this law is sometimes penal. This penal result is justified by a consideration of the laches and negligence of the claimant. The law avoids the greater of two evils, and sees that the lesser evil falls on the party who is himself to blame for it. It is not intended that persistence in wrong should engender a right or exempt the wrong-doer from liability; but it being expedient to protect all persons who have long enjoyed a right or an immunity, the law unavoidably protects some wrong-doers.

[9] See Mr. Justice Field's theory of laches, note 2, *infra*.

As the king (according to an English law maxim) can be guilty of no laches, it followed from this theory of laches that the civil claims of the Crown, as well as all criminal prosecutions (which are always criminal cases, instituted in the name of the sovereign), might be commenced at any distance of time. Modern legislation has, however, largely qualified this rule (see Stephen's Commentaries, the Royal Prerogative). The law of limitation in this country, even now, does not (with a few exceptions) apply to criminal prosecutions. (See The Queen *v.* Amiruddin, 15 W. R., 25; notes, p. 11, *supra*, and notes under sec. 6, Act XV of 1877, in the Appendix). At the time of the passing of Act XV of 1877, the Law Member of the Governor-General's Council said: "A Limitation Act should certainly comprise rules as to the time of commencing prosecutions for the various offences under the Penal Code, and we should have inserted the necessary provisions as to this matter, had we not felt the need of consulting the Local Governments before making so important an addition to our law, and for this there was no time." It may be mentioned here that sec. 195 of the Criminal Procedure Code of 1882 prescribes a limitation of six months when a Court sanctions a prosecution for an offence against public justice. In England, in the case of almost all offences punishable on *summary* conviction, the complaint must be made, or the information laid, within six months. (Calcutta Review for October 1886).

Limitation in criminal cases.

[10] See Lord Blackburn's judgment in Dalton *v.* Angus (1881), 6 App. Cas., p. 818.

Wolf and Vattel advance similar *theories* of "a *presumed consent*" and a "*presumed abandonment*" to explain the loss of a right by lapse of time. (Vattel's Law of Nations, Bk. II, chap. xi).

(Presumptions).

Justice West (citing Savigny and Pothier) says: "The law of prescription rests on a *presumption* that a right held for a certain time, *without contest*, as against a person capable of contesting it, could not have been successfully contested." (Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, at pp. 225, 226).

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exercised it during the prescribed period, whether there has been laches or not. And it is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities, or for any other reason are not to be considered guilty of laches in not using their right within the specified period; and such provisions there were in the Roman law, and commonly are in modern statutes of limitation. But the real policy and purpose of these laws (the quieting of disputes about titles and other matters of right, for the public good) would be defeated, if there was to be a further enquiry as to whether there had been acquiescence on the part of the right-holder.[1] Whatever the *theory* may be, their true foundation, in point of fact, is *public utility and convenience*.[2]

The true foundation of prescription—public utility and convenience.

It is often maintained that the lapse of the prescribed period raises a presumption that the claim is satisfied or released.[3] But it must be admitted that a statute of limitation is not designed merely to raise such a presumption, and that the presumption of satisfaction is not a correct theory for the administration of such a law, specially where it does not extinguish the right, but simply bars the remedy.[4]

The presumption of satisfaction or release.

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[1] See note 10, p. 28, *supra*.

[2] See the judgments of the Lord Chancellor and of Lord Blackburn, and the opinion of Field, J., in Dalton *v.* Angus (1881), 6 App. Cas., 740. At page 756, Field, J., says: "The foundation of a right upon mere long uninterrupted possession, as a matter of *public convenience*, is of very general application. Statutes of limitation have no other origin, and it is upon this principle that Story, J., in Tyler *v.* Wilkinson, puts rights of this kind" (prescriptive rights). In an earlier case, Adnam *v.* Sandwich (1877), 2 Q. B. Div., p. 485, Field, J., refers to the *theory* of these statutes in the following terms: "They all rest upon the broad and intelligible principle that persons who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties." (But there are *other* reasons as well. See p. 29, *supra*). The learned Judge considered this theory of laches, in *construing* an *ambiguous* law of limitation, and held that it was not intended by the Legislature to apply to a case where the rightful owner had been guilty of no neglect or default. The language of the law in that case was fairly open to the construction put upon it. See Lecture VI.

The theory of laches.

[3] Pothier, Lord Kames, and others put forward this theory, but even these authorities do not hold that the statute affords positive presumptions of payment and extinction of contracts. (See Angell, s. 66, note).

[4] See the remarks of Justice Wayne in Townsend *v.* Jemison. (Angell, s. 66, note). The statute does not pay the debt or create a presumption of payment, it is merely a statutory bar to recovery. It is a *shield*, and not a weapon of *offence*, and so is ineffectual where a party seeks affirmative relief upon allegations of payment. Thus a subscriber to stock to the amount of Rs. 2,000, who pays Rs. 1,000, and is afterwards sued for five calls of Rs. 200 each,

Limitation, a *shield*, not a weapon of *offence*.

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Different laws in different countries, and in different times.

Although the reasons of public policy and the subsidiary reasons adverted to above are of general application, they do not lead to the enactment of the same laws of limitation and prescription in every age and in every country. The length of time required by such laws, the manner and extent of their operation, the exceptions to them, and the events from which the time begins to run, vary not only according to the nature of the rights affected, but also according to the circumstances and necessities of each particular state.[5] One of the most important of these circumstances is the state of the commerce and trade of the country. The progress of commerce leads to the multiplication of contracts, and the frequency of intercourse between man and man, and thus enlarges the field of dispute and litigation. To check this litigation, rules of limitation more or less stringent are rendered necessary. But until this necessity arises, the Legislature does not ordinarily interfere. Thus, in England, there was no statute limiting *personal* actions (or actions *ex contractu* and *ex delictu*) until the reign of James I, and the ancient Hindus, who were by no means a commercial people, had no such law at all.

The circumstances and the principle which determine the length of the period of prescription.

Another circumstance is the state of knowledge in the country and the character of the administration of justice. Where the people are ignorant, and where suits cannot be carried on except at great sacrifice of time and money, longer periods of limitation are allowable. But as knowledge is diffused and the administration of justice becomes regular and pure, the periods of limitation are safely abridged.[6]

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against four of which he successfully defends by pleading the statute of limitations, cannot, by the payment of the fifth call, and an alleged *presumed* payment of the other four, compel the issue of a certificate of stock. To do this there must be proof of the *actual* payment of the *whole* amount subscribed. (See Buswell, p. 17). Mr. Justice Holloway, in Valia *v.* Vira (I. L. R., 1 Mad., 228, 231) says, that Savigny and Lord Coke supposed, "perhaps erroneously," that such statutes were based on the *presumption* of discharge.

As regards immoveable property, M. Melvill, J., says: "The principle upon which statutes of limitation rest is *not* so much that long adverse possession creates a *presumption* of title (for the law could hardly treat such a presumption as irrebuttable); but rather, that it would be unfair to call upon a defendant to defend his title when, through lapse of time, his muniments of title would be likely to have been lost." (Chhagonlal *v.* Bapubhai, I. L. R., 5 Bom., 68, 72).

But even where the statute does not apply, the *fact* of payment or satisfaction *may*, of course, be presumed from lapse of time or other circumstances which render the *fact probable*. (Angell, s. 93).

[5] See Angell, s. 22.

In this view a statute of limitation may be regarded as a "rule of *domestic* policy." (Westlake, p. 254). See p. 37, *infra*.

[6] The First Report of the English Real Property Commissioners.

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The periods should be so fixed as "to leave to the owners of things, and to those who pretend to any rights," ample time to recover them, and yet not to countenance claims which have been long dormant."

According to Vattel the law of limitation and prescription is a part of the law of nature and the voluntary law of nations.

"It has been maintained by Puffendorf, Wolfius, and Vattel that the doctrine of limitation and prescription is derived from the law of nature. M. De Vattel observes, that although Nature has not herself established an exclusive right of property over things, she approves of its establishment for the peace, the safety, and the advantage of human society. And as the absence of some limit to the assertion of rights apparently abandoned is calculated to introduce disorder into society, Nature approves of the institution of property on condition that every proprietor should take care of his property and make known his rights, so that others may not be led into error; and she lays down that every person who, for a long time, without just reason, neglects his right, should be presumed to have entirely renounced it. It is true that the law of nature alone cannot determine the *number* of years required to found a prescription, but this notwithstanding, the principle of prescription is founded in the law of nature, and is a part of the universal voluntary law of nations." Others[8] main-

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[7] See note 6, *supra*, and Domat, Bk. III, tit. 7, s. 4.

Some reasons for fixing the time to be allowed.

The facilities for *recovering* debts in England being greater than in India, the shorter limitation of three years to actions of debt here is open to objection. (See Dr. Stoke's speech in the Legislative Council, 19th July 1877). But the fact that written evidence is more liable to destruction in this country is one reason why our periods of limitation are shorter. (*Ibid.*) The periods of limitation applicable to bills of exchange and other mercantile contracts should, if possible, be the same in all countries which are closely connected with each other by commerce. (See Statement of Objects and Reasons of Sir J. Colvile's Limitation Bill). Only a moderate time should be allowed for bringing into dispute (delicate and intricate) questions respecting the legitimacy of an heir or the validity of an adoption. (See Jagodamba v. Dakhina, I. L. R., 13 Calc., 308, at p. 321, P. C.)

[8] Vattel's Law of Nature, Bk. II, chap. xi.

The necessary and the voluntary law of nations (as distinguished from the customary and the conventional law of nations) are both established by nature, but each in a different manner; the former as a sacred law, which nations and sovereigns are bound to respect and follow in all their actions; the latter, as a rule, which the general welfare and safety induce them to admit in their transactions with each other. The voluntary law is the uniform practice of nations in general.

[9] See Brown on Limitation, Bk. I, chap. i, s. 1.

Grotius favors the opinion that prescription is established by municipal law, though he is sometimes quoted as upholding the opposite view. Lord Coke observed that the limitation of actions was by force of divers Acts of Parliament. (Co. Litt. 115).

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tain that, as the institution of property supposes the existence of Civil Society and Civil Government, prescription, which is a corollary of property, must necessarily rest on civil and positive law. It is not denied by these authorities that the utility of the doctrine has caused its adoption, to a greater or less extent, by most civilized nations. Lord Stair in his Institutions treating of the law of Scotland, says: "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it."[1]

According to Lord Stair, it is a positive law.

The great jurist Thibaut considers the law of limitation and prescription to be a singular (or special and arbitrary) law, and he accordingly places it under the head of *jus singulare*,[1] as opposed to *jus commune* which is common to all societies and conformable to natural legal principles.

According to Thibaut, it is *jus singulare*.

Modern jurists divide the municipal or positive law of every political community or nation into two kinds: 1*st*, Natural; 2*nd*, Positive.[2] Natural laws are those which are common to all political societies, and being palpably useful have their counterpart in the shape of moral rules, even in natural societies which have not ascended from the savage state. All other laws are merely positive, *i.e.*, of purely human position.[3] According to this classification, laws of limitation and prescription are purely *positive* laws.

It is merely positive.

But a "sense of a great good and a great evil" has in all times and places led almost all civilized nations, by perfectly distinct paths, to the adoption of the doctrine of

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[1] See this passage quoted in Montriou's Institutes of Jurisprudence, p. 178, and in Dalton *v.* Angus, 6 App. Cas., p. 818.

"Matter"—whether prescription applies to all things and rights, or only to some things and some rights.

"Manner"—whether it operates negatively only or positively also.

"Time"—whether the prescriptive period is 12 years, or more, or less.

[1] Lindley's Thibaut, pp. 30 and 175. It should be observed that laws creating *privilegia* are sometimes called *jus singulare*, but Thibaut does not use the term in that sense.

[2] The expression 'positive law' is sometimes used as the name of a *genus*, and sometimes as the name of a *species*. The law of limitation and prescription is a 'positive law' in the *specific* sense of that expression.

[3] Austin, Lecture 32. Natural laws are supposed to proceed from the intelligent and rational nature, which directs the universe, and are known to men through a natural reason or an infallible moral sense.

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prescription, which, though "arbitrary in its term, is fixed in its principle."[a] It must be admitted, however, seeing that the doctrine is not recognised[b] by the old customs of Scotland and the laws of the Jews and the Mahomedans, that laws of limitation and prescription are not natural laws of universal application. Lord Blackburn, in his judgment in *Dalton* v. *Angus* (1881), adopts the view put forward by Lord Stair, and holds that such laws are not derived from natural justice, but are positive laws founded on expedience and varying in different countries and at different times.

Lord Blackburn follows Lord Stair.

The law of limitation and prescription is public law, as opposed to provisional law.

Laws of limitation and prescription are often classed as a department of public law. They are introduced mainly for the public good, and are simply imperative or absolutely binding. The Legislature determines absolutely what shall be the effect of the lapse of a certain time under certain circumstances, whether the parties concerned provide otherwise or not.[c] Such laws cannot be altered, or derogated from, by private compacts. *Jus publicum privatorum pactis mutari non potest.*

The Indian Contract Act, sec. 28, provides that every agreement which limits the time within which a party thereto may enforce his rights by the usual legal proceedings in the ordinary tribunals is void to that extent.[ca]

In the Full Bench case of *Kisto Kamal Sing* v. *Hurree Sardar* (13 W. R., F. B., 44; S. C., 4 B. L. R., F. B., p. 105), Sir Barnes Peacock, C. J., says: "If a man having a cause of action against another to recover immoveable property, or to recover money, or to recover damages for a trespass upon his land, or for an assault, should say to that person 'I will not sue you for twenty years,' he would not acquire a right to sue after the period of limitation fixed by law.

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[a] Phillimore's Private Roman Law, p. 125; Domat's Civ. Law, paragraph 2188.

[b] Lord Stair's Institutions, Bk. II, tit. 12, s. 9. See 6 App. Cas., p. 818; Domat's Civ. Law, para. 2184; and Lecture I, p. 14, *supra*.

[c] In this sense, public or prohibitive law is opposed to dispositive or provisional law. The expression 'public law' is extremely ambiguous. (See Austin's Jurisprudence by Campbell, Vol. II, pp. 780-82). For instances of 'provisional law,' see ss. 230 and 253 of the Indian Contract Act (No. IX of 1872), and ss. 106 and 305 of the Indian Succession Act (No. X of 1865). A dispositive or provisional law takes effect only in case no disposition or provision is made by the parties themselves.

[ca] An agreement not to sue until the defendant attained his majority, cannot stay the operation of the statute of limitation, and as such agreement would limit the time within which the plaintiff could enforce his rights, it would be void under sec. 28 of the Contract Act. (Jaganatha v. Ramabhadra, I. L. R., 11 Mad., 380, at p. 393).

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If he binds himself not to sue within a stated period, and does not intend to give up his right to sue at all, he must take care not to bind himself beyond the time within which the law of limitation allows him to sue." "The Legislature must have had some object in limiting the period, and that object cannot be frustrated by any private agreement." So, again, an agreement by a person *against* whom a cause of action has arisen, that he would not take advantage of the statute, cannot affect its operation on the original cause of action,[7] unless indeed such agreement amounts to an acknowledgment of liability which the statute itself recognises as an exception to the rule.

Laws of prescription and limitation are general private laws, substantive and adjective.

According to Bentham's classification, laws of limitation and prescription are *general* private laws, which may be either substantive or adjective.[8] A law of limitation, as affecting the form of the *remedy*, comes under the head of adjective law. A law of prescription, as affecting the substance of the right itself, comes under the department of substantive law.

Where a particular statute of limitation not only bars the remedy but extinguishes the right, it ceases to be merely adjective law or law which regulates the practice of the forum.[9] It then becomes, in so far as it extinguishes rights, a part of the substantive law of the

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[7] East India Company *v.* Oditchurn Paul, 5 Moo. I. A., 44; and Darby and Bosanquet on the Statutes of Limitation, pp. 56, 57 and 437. Negotiations and correspondence between the plaintiff and the defendant shewing that the latter agreed to, and did, make an enquiry into the merits of a disputed claim are not sufficient to bar the operation of limitation. (See E. I. Co. *v.* Oditchurn, 5 Moo. I. A., 44; Doya Narain *v.* The Secretary of State, I. L. R., 14 Calc., 256). According to Articles 2220 to 2223 of the Code Napoleon, "prescription cannot be renounced by *anticipation*," but prescription (already) *acquired* may be renounced or abandoned if the party is not incapable of making an alienation. (See Lectures IV and VI, *infra*). As to the effect of an acknowledgment of title or liability *before* the expiry of the law-defined period, see Lectures VI and X.

[8] Substantive or material law (as opposed to adjective, formal, instrumental or processual law) is the law which the Courts are established to administer, as contradistinguished from the rules of procedure according to which such law is administered. (See Austin's Jurisprudence, Vol. II, p. 611). 'Private law,' according to Bentham, is opposed to political or constitutional law, and 'general law' is opposed to the law of personal status.

[9] Krishna Mohun Bose *v.* Okhil Money Dassee, I. L. R., 3 Calc., 331, A. C. See also the remarks of Holloway, J., in Valia Tamburrati *v.* Vira Rayan, I. L. R., 1 Mad., 228, 234.

It may be here observed that, as regards *immoveable* property, the weight of authority is in favor of the position that, even where the law in *terms* limits the suit only, it *in effect* gives the adverse possessor the *property* as well as the possession; and that the question whether

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place. The rule laid down in sec. 28 of the Indian Limitation Act, 1887, is, therefore, a rule of substantive law. But the law of limitation, strictly so called, is always a *lex fori*—it goes *ad litis ordinationem* and not *ad litis decisionem*; it goes to the remedy, and bars the hearing of the cause; it does not go to the right and determine the merits of the cause."**

The law of limitation a *lex fori*.

"It has become almost an axiom in jurisprudence," say their Lordships of the Privy Council in an Indian case, "that a law of limitation is a law relating to procedure having reference only to the *lex fori*."[1] In another case their Lordships say that in matters of procedure all mankind, whether aliens or liege subjects, are bound by the law of the forum.[2] The reasons of the rule are thus given by Story in his Conflict of Laws (s. 581): "Courts of law are main-

The *lex fori* preferred to foreign law in matters of procedure.

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the law bars the remedy only, or extinguishes the right, becomes immaterial. Thus, in an action of ejectment brought in the Calcutta Supreme Court to recover some lands in the mofussil of Bengal, although the period of twenty years allowed by the *lex fori* (21st James I, c. 16) had not expired, the Court held that, as the mofussil law (Reg. III of 1793, and Reg. II of 1805) in effect extinguished the right of property after twelve years' adverse possession, the plaintiff, who had been dispossessed for more than twelve years, was not entitled to a decree. (Shib Chunder Dass *v.* Shib Kissen Dass, 1 Boulnois' Reports, p. 70. See also Radha Bai *v.* Anantrav, I. L. R., 9 Bom., 198, 229; and note 7, p. 3, *supra*). As regards immoveable property, the *lex loci rei sitæ* is preferred to the *lex fori*. (See Story's Conflict of Laws, secs. 483 *et seq.*, and 581; Westlake's Private International Law, p. 182; Pitt *v.* Dacre, L. R., 3 Ch. Div., 295). *In re* Peate's Trusts (L. R., 7 Eq., 302), in which the *sale-proceeds* of certain *houses* in Calcutta had to be administered in England, it was held by V. C. James in 1869, that, one of the co-proprietors having been dispossessed of a share of the property for more than twelve years, his claim to such share of the sale-proceeds was barred by cl. 12, s. 1, Act XIV of 1859, which was the *lex loci rei sitæ*. Generally speaking, all suits relating to land are brought in the Court of the place where the land is situate, and as the *lex situs* coincides with the *lex fori*, the question of preference does not arise. As regards *prescriptive right* to immoveable property, all agree that the *lex loci rei sitæ* must be applied. Opinions, however, differ as to the law which ought to regulate the title to moveables so acquired. But as the title depends on possession, which is a *mere fact*, it is reasonable that the law of the place where this fact occurs should be applied. (Woolsey on International Law, 4th Ed., p. 116). Where the right to *moveable* property has been *extinguished* by the lapse of a certain period of time under the law of the *place* where wrongful possession was taken of it, it would seem that a suit for recovery of possession of such property must fail even in a *foreign country* to which the originally wrongful possessor may have since removed it, although such suit is *not barred* by the limitation law of the latter country. (See Buswell, pp. 492, 493; and Lecture XI).

Lex loci rei sitæ where applicable.

As to immoveables.

As to moveables.

** Story's Conflict of Laws, ss. 576, 580. See Manghulall *v.* Kandhailal, I. L. R., 8 All., 475, at p. 483.

[1] Ruckmabye *v.* Lulloobhoy, 5 Moo. I. A., 234.

[2] Lopez *v.* Burslem, 4 Moo. P. C. C., 300.

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tained by every nation for its own convenience and benefit, and the nature of the remedies and the time and manner of the proceedings are regulated by its own views of justice and propriety, and fashioned by its own wants and customs." "It is not obliged to depart from its own notions of judicial order from mere comity to any foreign nation." Accordingly, where different laws of limitation are established in different countries or in different parts of the same country, and they conflict with each other, the law of the Court or forum in which the suit or proceeding is brought governs the case.[3] The *lex fori* is preferred to the *lex loci contractus* and the *lex loci delicti commissi*. The statute of limitation being a rule of *domestic* policy, it is agreed on all hands that the Courts are justified in declining to enforce an obligation which is barred by the statute, although it may be still enforceable according to some foreign law of limitation.[4]

Reasons why the *lex fori* is preferred.

Limitation law, a rule of *domestic* policy.

A foreigner has no right to crowd the tribunals of any independent community with stale claims of his own. There can be no just reason in allowing him higher privileges than are allowed to subjects.[5] And a native subject to whom a cause of action arises in a foreign country can have no pretence to say that he is entitled to the longer time allowed by the law of the foreign country.

Where the foreign law allows a shorter period, and the action is barred by that law, some jurists (according to whom the bar of the action is virtual extinction of the *right*) maintain that such bar ought to be recognised by the Court where the suit is instituted.[6] But in England and the

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[3] It may be mentioned here that, in the matter of the execution of decrees passed by one Court but transferred for execution to a different Court, the law of the latter Court, *viz.*, the Court executing the decree, is preferred to the law of the former Court. (Leeke *v.* Daniel, 10 W. R., F. B., 10; Hukum Chand *v.* Gyanendra, I. L. R., 14 Calc., 570).

[4] See Westlake's Private International Law, p. 254. *Lex fori* is the law of the forum or Court where the suit is brought. *Lex loci contractus* is the law of the place of the contract. *Lex loci delicti commissi* is the law of the place where the tort or *delict* is committed. As statutes of limitation simply say that the obligation shall not be enforced in the Courts in which they claim authority, the obligation may be sued upon in other Courts if the procedure of those Courts allows it. (Foote, 422). See p. 31, *supra*.

[5] Story's Conflict of Laws, s. 576.

[6] See Angell on Limitations, s. 66. Justice Story, before he published his Conflict of Laws, was of this opinion. Mr. Westlake also appears to take the same view of the matter. (Westlake's Private International Law, p. 254). The view taken by the English and American Courts is supported by Savigny. "Illustrious names are to be found on both sides, Savigny at the head of the one, and Vangerow of the other." *Per* Holloway, J., in Valia *v.* Vira, I. L. R., 1 Mad., 228.

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The same rule applies whether the foreign law allows a shorter or a longer period.

United States of America it has always been a rule that, in personal actions, limitation strictly affects the remedy and not the right. And unless the foreign law actually *extinguishes* the obligation itself, the English and American Courts refuse to give effect to such law, whether the period allowed by it be shorter[7] or longer[8] than[9] that allowed by their own laws.

The conditions on which a foreign law of limitation may be preferred to the *lex fori*.

Story in his Conflict of Laws (s. 582), and Chief Justice Tindal in *Huber* v. *Steiner*, lay down that a foreign law of limitation may be preferred to the *lex fori* on two conditions:[10] (*a*) that the foreign law extinguishes the right or obligation itself;[1] and (*b*) that both the parties have resided in the country where such law prevails for the whole of the prescribed time. But if the foreign law is so framed as to operate upon the case without such residence, the second condition would seem to be inapplicable.[2]

Limitation is not "of the nature of the contract."

In respect of actions *ex contractu* it may be observed that the limitation of the *remedy* is not a part of the contract, but relates to the *breach* of it, which it would be contrary to good faith to suppose the parties had in contemplation at the time of entering into it.[3] But if the bar extinguishes the right or the obligation itself, it may be taken as an incident of the original contract, and as such its validity must be determined even in a foreign forum by the *lex loci contractus*.[4] If the *lex loci contractus*

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[7] Huber *v.* Steiner, 2 Bing., New Cases, 202; and Townsend *v.* Jemison. (See Angell on Limitations, chap. viii, s. 66).

[8] British Linen Company *v.* Drummond, 10 B. and C., 903.

[9] Ruckmabye *v.* Lulloobhoy Motichand, 5 Moo. I. A., 234; and Story's Conflict of Laws, s. 577.

[10] Sec. 12 of Act IX of 1871 and sec. 11 of Act XV of 1877 lay down the same rule.

[1] This, however, is not perhaps a frequent case in regard to personal actions. (Banning on Limitation, p. 9). Even under the Scotch and the French law of prescription as to debts, the right or the obligation is not wholly extinguished. See Don *v.* Lippman and Huber *v.* Steiner.

[2] See Smith's Leading Cases, 8th Ed., Vol. I, p. 699. A law of limitation which not only bars the remedy, but extinguishes the obligation itself, not being a law of procedure at all, is entitled to claim universal recognition, *without* the aid of any *additional* considerations. (Foote's Private International Law, p. 424). The Indian Legislature, however follow Story and Tindal. (See sec. 11, Act XV of 1877).

[3] See Don *v.* Lippman, 5 Clarke and Finelly, 1, *per* Lord Brougham. The law of limitation of a particular country, even in a case of a contract made in such a country, forms no part of the contract itself, but merely acts upon it *ex post facto* in a case of a suit. It cannot properly be deemed a right stipulated for or included in the contract. (Story's Conflict of Laws, 583).

[4] *Per* Colvile, J., in Beerchand Poddar *v.* Romanath Tagore. (Taylor and Bell's Reports, p. 131). It is an established principle of

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declares the obligation to be a nullity after the lapse of the prescribed period, it may be set up, in any other country to which the parties remove, *by way of extinguishment.*[5]

Otherwise when the bar extinguishes the right.

When the time of the extinguishment of the right itself by the foreign law is shorter than the time of the limitation of the action by the *lex fori*, the validity of the former bar is sufficient to dispose of the case. But where the time allowed by such foreign law is *longer*, the foreign law, as well as the *lex fori*, may be applicable. The bar to the remedy resulting from the latter, and the extinguishment of the right resulting from the former (the *lex loci contractus*), may both be pleaded on one and the same record.[6] If the law of the country in which the suit is instituted, as well as the foreign law, not only bars the remedy but extinguishes the right, the *lex fori* must, so far as it *extinguishes* the right, yield to the *lex loci contractus* or *solutionis*.

When the *lex fori* and the *lex loci contractus* are both applicable.

The Hindu and Mahomedan laws being *personal* to Hindus and Mahomedans, and foreign to the Courts of British India, the Hindu and Mahomedan rules of limitation, if any, cannot be pleaded by Hindus and Mahomedans in such Courts, even in cases where their own substantive laws are preserved to them by the law of British India. Thus it has been held that, in suits for pre-emption between Mahomedans, it is not necessary to consider whether the Mahomedan law requires the plaint to be filed within a period shorter than that allowed by the Regulations and the Acts.[7] And where the question was whether the *lex fori* of the Calcutta Supreme Court, *viz.*, the Statute 21st James I, which fixed a six years' limit, or the Hindu law, which it was alleged prescribed a ten years' limit, should be applied to an action *ex contractu*

The personal laws of the Hindus and Mahomedans yield to the *lex fori*.

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international law that the *validity*, *interpretation* and *obligatory force* of contracts must be determined according to the *lex loci contractus* or *solutionis*, that is, according to the law of the country where the contract is made, or (if the contract is to be so performed that it must be considered to be a contract of that country) according to the law of the country where it is to be *performed*. The *discharge* of a contract is also governed by the *lex loci contractus* or *solutionis*, and not by the law of the defendant's domicil, or any other foreign law. (See Gibbs *v.* Societe, 25 Q. B. D., 399, 400, 405). It is equally well settled that *remedies* on contracts are to be pursued according to the law of the place where the *action* is *instituted*, and not according to the law of the place where the *contract* is made. (Story, 482). The time when the *cause of action* accrues is a question of construction, and is to be ascertained from the contract itself or from the *lex loci contractus* or *solutionis*. (See Buswell, p. 488).

Lex loci contractus or *solutionis* where applicable.

[5] Huber *v.* Steiner, quoted above.

[6] See Beerchand Poddar *v.* Romanath Tagore, quoted above.

[7] Mahomed Danesh *v.* Choora Gazee, Calc. Sudr. Dewany Adawlat Reports of 1851, p. 292. See also the Reports of 1859, p. 464.

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brought in the Supreme Court by one Hindu against another, it was held that the Statute of James I was the only applicable bar.*

English and native calendars.

It has also been ruled that the law of limitation being a law of procedure, in order to see by what computation the time must be reckoned, we must look to the calendar and the mode of computing time, according to the law which regulates the proceedings of the Court by which the suit is tried. In British India, this must be the British, that is, the Gregorian calendar, and not the Fuslee or any other native calendar, except where the law expressly otherwise provides.* The General Clauses Act, I of 1868, section 2, expressly enacts that "year" and "month" (in that and all subsequent Acts made by the Governor-General of India in Council) mean a year and month reckoned according to the British calendar. The Limitation Act, XV of 1877, section 25, provides that "all *instruments* shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar."

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* Beerchand Poddar *v.* Romanath Tagore, Taylor and Bell, p. 131. In this case the Court was of opinion that by Hindu law, there was no limitation to actions on contracts, and that, if there was, it did not extinguish the obligation, and, therefore, did not form a part of the contract, so as to render the Hindu law applicable under s. 17 of the 21st Geo. III, c. 70.

* Maharaja Joy Mungal *v.* Lall Rung Pal, 13 W. R., 183; 4 B. L. R., Appendix, 53. As to how "months" are computed, see Saroda Pershad *v.* Pahali Mahanti, I. L. R., 10 Calc., 913. See Lecture VIII, and notes to sec. 25, Act XV of 1877.

Special express provisions.

For *special* provisions in respect of the time from which limitation *begins* to run, see Art. 2, cl. (*b*), Sch. II of the Bengal Tenancy Act, VIII of 1885, and Art. 85, Sch. II, Act XV of 1877. As to the date on which a petition for the sale of a putni should be filed, see Reg. VIII of 1819, sec. 8, cls. 2 and 3, and Sreemuttee Dossee *v.* Pitamber Panda, 24 W. R., 129, 133.

Under the Bengal Tenancy Act, suits for arrears of rent must be brought within three years from the last day of the *Bengali year* in which the arrear fell due, where that year prevails, and the last day of the *month of Jeyt* of the *Amli* or *Fuslee* year in which the arrear fell due, where either of those years prevails.

Under Article 85 of the General Limitation Act, a suit for the balance due on a mutual, open, and current account must be instituted within three years from the close of the year in which the last item admitted or proved is entered in the account; such *year* to be computed *as in the account*.

Under Bengal Reg. VIII of 1819, an application to the Collector for the sale of a putni tenure for the arrears of the year just expired must be made on the 1st of *Baisakh*, and the mid-year sale must be applied for on the 1st of *Kartick*.

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LECTURE III.

HISTORY OF THE LAW OF LIMITATION AND PRESCRIPTION IN BRITISH INDIA.

(I). Bengal Mofussil—Plan for the administration of justice, 1772—Regulation III of 1793—Regulation II of 1805—Other laws—(II). Madras Mofussil—Regulation II of 1802—(III). Bombay Mofussil—Regulation I of 1800—Regulation V of 1827—The three Codes of Bengal, Madras, and Bombay compared—Non-regulation Provinces—Execution of decrees—(IV). The Supreme Courts—21 James I, c. 16; 4 Anne, c. 16—Act XIV of 1840—Execution of decrees—The law of the Supreme Courts compared with that of the Mofussil Courts—Draft Limitation Bills, 1841-1855—Act XIV of 1859—Act IX of 1871—Extinctive and Positive Prescription partially introduced—Act XV of 1877—Amendments.

BEFORE Act XIV of 1859 (an Act to provide for the limitation of suits) came into operation in 1862, there was one code of laws for the Courts established by Royal Charter in the Presidency-towns, and a separate code for the Company's Courts in each of the three Presidencies of Bengal, Madras, and Bombay.

I. Bengal mofussil.

Plan for the administration of justice, 1772.

When the administration of civil justice in Bengal was first committed to the servants of the East India Company, and Courts of Dewany Adawlat were established, a plan for the administration of justice was proposed by the Committee of Circuit, which was adopted by Government on the 21st August 1772. This document makes the following declaration: "By the Mahomedan law, all claims which have laid dormant for twelve years, whether for land or money, are invalid; this also is the law of the Hindus and the legal practice of the country."[1] This statement does not appear to be correct with respect to the Hindu and Mahomedan *laws*,[2] though it may have been so with regard to the legal *practice* of the country; and whether previously established or not, the rule had been in force for upwards of twenty years, when Lord Cornwallis codified the law in 1793.

Reg. III of 1793.

Section 14, Regulation III of 1793, prohibited the zillah and city Courts from hearing, trying, or determining the merits of any suit whatever against any person or persons, if the cause of action accrued previous to the 12th August 1765 (the date of the Company's accession to the Dewany of the Provinces of Bengal, Behar, and Orissa), or if the cause

[1] See the Preamble to Reg. II of 1805.

[2] See pp. 14, 19 *et seq.*, *supra*.

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Twelve years in all cases.

of action arose twelve years before the commencement of any suit on account of it; unless the complainant could show, by clear and positive proof (*a*) that he had demanded the money or matters in question, and that the defendant had admitted the truth of the demand or promised to pay the money (within the last twelve years so as to constitute a new ground of action within the limited period); or (*b*) that he had directly preferred his claim within twelve years (after the origin of the cause of action), for the matters in dispute, to a *Court of competent* jurisdiction to try the demand, and assigned satisfactory reasons to the Court why he had not proceeded in the suit; or (*c*) unless he proved that either from minority or other good and sufficient cause he had been precluded from obtaining redress. The same prohibitions were extended to the Province of Benares by sec. 8, Regulation VII of 1795 and to the Ceded Provinces by sec. 18, Regulation II of 1803, with the substitution of the dates of the Company's acquisition of those provinces for the 12th August 1765.

Good and sufficient cause.

Reg. II of 1805.

Regulation II of 1805, following the English Nullum Tempus Act (9 Geo. III, c. 16), fixed sixty years as the period of limitation in respect of suits and claims by Government for the recovery of public rights and dues, not being penalties recoverable in the Civil Courts under any law in force. (Secs. 2 and 6). This Regulation also restricted the limitation of twelve years, in cases of immoveable property, to possession under a just and honest title, and allowed a period of sixty years to claims of right to such property, if the claimant could show by sufficient proof, that the person in possession acquired the same by violence, fraud, or by any other unjust and dishonest means, or that the property claimed had been so acquired by any other person from whom the actual occupant derived his title, and was not subsequently held for twelve years under a fair title believed to convey a right of possession and property.[1a] (Sec. 3).

Public rights and dues.

Just title.

Knavish possession.

Mortgages and deposits.

A period of one year only was allowed to suits for penalties, and summary suits for arrears of rent. (Secs. 4 and 6). It was declared that no length of time would bar the cognizance of suits for the recovery of property mortgaged or deposited, provided the party in possession or his predecessor in interest had not held it under a title *bonâ fide* believed to have conveyed a right of property to the possessor. (Sec. 3, cl. 4). Subject to this declaration, sec. 3, cl. 3,

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[1a] See pp. 17, 18, 21, 23 and 24, *supra*. This adoption of the general rule of jurisprudence in favor of a *fair* title *believed* to be just (see note 10, p. 24, *supra*) is attributable to the fact that many of our legislators at this period of time were Scotch Civilians.

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deprived the Courts of all authority to take cognizance of *any suit whatever*, if the cause of action arose sixty years before the institution of the suit; and in *Chundrabolee Debi* v. *Lukhi Debi*, 5 W. R., P. C., 1, it was held that this provision modified the *nullum tempus* clause of Regulation XIX of 1793 as to suits for the resumption or assessment of *lakhiraj* holdings created after the 1st December 1790. General, maximum period.

Regulation VIII of 1831, sec. 6, assigned a period of one year to regular suits for contesting the summary awards of the Revenue Authorities in matters connected with arrears or exactions of rent. Other laws.

Act I of 1845, sec. 24, and Act XI of 1859, sec. 33, prescribed a limit of one year to suits to set aside sales for arrears of revenue.

Act XIII of 1848 fixed a period of three years for suits to contest the justice of certain possessory awards made by the Revenue Authorities in the Presidency of Bengal.

Clauses 1, 2 and 3 of Madras Regulation II of 1802, sec. 18, provided for suits of which the cause of action accrued before the date of the Company's acquisition of the country. II. Madras mofussil. Reg. II of 1802.

Clause 4 enacted a general law of limitation in the following words: "The Courts of Adawlat are prohibited from hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period, for the matters in dispute, to a Court of competent jurisdiction or *person having authority, whether local or otherwise, for the time being, to hear such complaint*, to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority or other good and sufficient cause, he was precluded from obtaining redress."

"But from this rule are excepted all claims founded on bonds which shall have been in course of payment by instalments, or of which any proportion shall have been paid within twelve years previous to the institution of the suit; and also all claims on mortgages, the period for rendering which obsolete and unactionable is to be determined by the laws of the country."

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Mad. Reg.—very nearly the same as Ben. Reg. of 1793.

The first paragraph of this clause, with the exception of the words italicised, is in the same terms as sec. 14, Regulation III of 1793. As to the second paragraph it may be observed that it was held by the Calcutta Sudder Court that the operation of sec. 14, Regulation III of 1793, was also barred by the payment of an instalment on a bond. (Cal. S. D., 1845, p. 193; S. D., 1847, p. 277; S. D., 1849, p. 69; and Macpherson's Civil Procedure).

III. Bombay mofussil. Reg. I of 1800.

Article 13 of the First Regulation of the Governor of Bombay, confirmed in Council in August 1800, for the institution of a Court of Justice in Surat, was a transcript of sec. 14 of Bengal Regulation III of 1793, and corresponded to the first paragraph of clause 4, sec. 18, Madras Regulation II of 1802.

Subsequently, Regulation V of 1827 (of the Elphinstone Code) enacted as follows:—

Reg. V of 1827.

Positive prescription.

Section I.—"Whenever lands, houses, hereditary offices or other immoveable property[a] have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs, or others deriving right from him, such possession shall be received as proof of a sufficient right of property in the same. But it shall be a sufficient answer to the plea of the possession for more than thirty years that the person in possession as proprietor, or any of the persons by whom he derives his right, acquired such possession by fraudulent means, on proof whereof a suit may be entertained at any period within sixty years.

"Provided that if such property has been held for more than thirty years by a person or persons *bonâ fide* believing his or their title as proprietors to be good, such title shall not be affected by the fraud of a former possessor.

"Nothing contained in this section shall bar an action of damages brought within sixty years against any of the persons by whom the fraud was committed."

Section II.—"In all suits for damages on account of assaults, imprisonments, or other direct insult or injury to the person, it shall be a sufficient defence that the cause of action arose more than twelve months before the suit was filed.

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[a] It has been *held* that this section applied to the acquisition of *incorporeal* rights, such as easements. See Anaji *v.* Morushet (2 Bom. H. C., 334), and Mohanlal *v.* Amratlal (I. L. R., 3 Bom., 174). But it may be doubted if mere actual uninterrupted enjoyment for more than thirty years, under this section, without proof of user *as an easement*, was sufficient to establish a right to an easement. (Chunilal *v.* Mangoldas, I. L. R., 16 Bom., 592).

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"And in all suits for damages on account of calumny or slanderous words it shall be a sufficient defence that the plaintiff had been in the knowledge of the calumny or slanderous words more than twelve months before the suit was filed. Bom. Reg. of 1827

"In all suits for recovering the right of participation in caste communications, it shall be a sufficient defence that the plaintiff had been acquainted with his exclusion from the caste more than twelve months before the suit was filed."

Section III.—"In all civil suits for debts not founded upon, or supported by, an acknowledgment in writing, and in all suits for damages other than those specified in the preceding section, it shall be a sufficient defence that the cause of action arose more than six years before the suit was filed."

Section IV.—"In all suits not falling under any of the limitations in the preceding sections of this chapter, it shall be a sufficient defence that the cause of action arose more than twelve years before the suit was filed."

Section VII, Clause I.—"If, however, a defence be rested on any limitation of time hereto specified in this chapter, and the claimant prove that the defendant, or person from whom he derives right, had admitted the justice of the demand, then the time of limitation shall be reckoned from the date of such admission, provided that, if the demand be founded on a written acknowledgment of any sort, the admission, if it shall have been made subsequently to the date which shall be fixed for the commencement of the operation of this Regulation, must also be in writing."

Clause II.—"Also if the claimant have, within the time of limitation, preferred his claim to any authority (arbitration included) competent to try it, and satisfactory reason be shown why a decision was not passed (such reason in no wise affecting the justice of the demand), then the period of limitation shall be reckoned from the date of the last proceeding known to the defendant in such case."

Clause III.—"And in cases of the minority or continued insanity of the claimant no limitation shall bar the recovery of a claim sued for within six years[3a] of the minor attaining the age of eighteen years or the insane person recovering

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[3a] The Agra Sudder Court allowed only a "reasonable" time after the cessation of the disability. The Calcutta Sudder Court allowed the *full* twelve years, if the cause of action first accrued to the plaintiff while he was a minor or a lunatic. (See Calc. S. D., 1855, p. 281). If a cause of action *devolved* on a person laboring under a disability, the operation of limitation was *suspended*. (See Macpherson's Civil Procedure Code, App., 198).

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the use of reason, and, if a claimant die during such minority or insanity, the said period of six years from his death shall be applied to suits entered by his heirs or executors."

Clause IV.—"Except in actions for damages as described in sec. 2 of this Regulation, in which cases a period of only one year shall be allowed instead of the period of six years recited in the preceding clause."

Section VIII, Clause I.—"If a person claims to recover property held in mortgage, pledge, pawn, or deposit, or by other title conferring only a right of possession, and not a right of ownership, in such case no length of time shall prevent the Court's entertaining the suit."

Clause II.—"But should such property have been held, if immoveable, for more than thirty years, by a *bonâ fide* possessor as proprietor; or, if moveable, for any time by a person possessing *bonâ fide* as proprietor, under a right founded on an equitable consideration, such possessor shall not be disturbed, though an action of damages may be entertained against the person by whom it was illegally alienated."

The three Codes of Bengal, Madras, and Bombay compared.

(1). There was no *special* limitation, by the Regulations of Madras and Bombay, to suits for the recovery of penalties or for the recovery of public rights and dues. (2). Nor was there any *such* limitation by the Regulations of *any* of the Presidencies to suits to set aside the summary decisions of the *Civil* Courts. (3). Positive prescription was not directly recognised by the Codes of Bengal and Madras, but it was partially recognised by Bombay Regulation V of 1827. (4). This Regulation made lapse of time a sufficient *defence*, while the other Regulations *prohibited the Courts* from hearing, trying, or determining the merits of any suit after the lapse of the fixed period of time. (5). Verbal acknowledgments of liability were sufficient to give a fresh start in all cases in the Bengal and Madras Presidencies, but a written acknowledgment was necessary under Bombay Regulation V of 1827, when the debt was founded on a writing. (6). The Madras and Bengal Regulations gave the Courts a sort of discretion to extend the period of limitation for any "good and sufficient cause," which precluded the plaintiff from obtaining redress; so that even depositing a document in one Court was in one case held to be a "sufficient cause" for not enforcing a claim under it in another Court.[4] But the Bombay Regulation of 1827

[4] See Special Reports of the Indian Law Commissioners (1841-3), p. 7. The *vagueness* of the words of this exception is referred to in Sankaran v. Periasami, I. L. R., 13 Mad., 467, at p. 469.

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distinctly specified *minority* and *continued insanity* as the only disabilities recognised by it. (7). The Madras Regulation, and Bombay Regulation I of 1800, fixed one general period of limitation, *viz.*, twelve years, for all sorts of suits, and the Bengal Regulations did the same with some few exceptions. Under the Bombay Regulation of 1827, however, suits for damages on account of injury to the person and reputation, and for the recovery of the privileges of caste, were limited to one year; and suits for debts not founded upon or supported by writings, and for damages other than those above specified, were limited to six years. Suits for the recovery of immoveable property and hereditary offices were barred after thirty years, and all other suits after twelve years. (8). The Bengal Code, as well as the Bombay Code, extended the period of limitation to sixty years in cases where the possession of *immoveable* property had been acquired by *fraudulent* means. The former Code also allowed sixty years in cases of *violence*. There were no such provisions in the Madras Code. (9). The Madras Regulation and the later Bombay Regulation allowed the plaintiff further time if he preferred his claim to *any person* having authority, while the Bengal Regulation required that the claim should be preferred to a Court of competent jurisdiction.

The three Codes compared.

Thus the Regulation law of limitation of each Presidency differed from that which obtained in the other Presidencies, the difference being most remarkable in the case of Bombay Regulation V of 1827 as compared with the Regulations in the other two Presidencies.

These Regulations did not apply to the Non-Regulation Provinces. The Punjab Code modified Bengal Regulation III of 1793, sec. 14, and reduced the limitation of actions of debt or contract, excepting partnership accounts, from twelve to six years. In Oude certain circular orders of the Judicial Commissioner were in force before Act XIV of 1859 was extended to it by public notification by the Executive Government.[5]

Non-Regulation Provinces.

The rule as to applications for the execution of decrees was not expressed in the Regulations, but the twelve years' limitation was adopted in Bengal by analogy to the general law for the trial of suits,[6] and such applica-

Execution of decrees.

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[5] See Saligram *v.* Mirza Ali Beg, 10 Moore's I. A., 114; and Shah Mukhun Lall *v.* Nawab Imtiazdulla, 5 W. R., P. C., 18.

[6] See Constructions 3, 136 and 1348, and the case of Juggannath Pershad Sircar decided in 1818. The correctness of these constructions and of the ruling in Juggannath Pershad's case may be questioned, but they were upheld on argument on the principle of *stare decisis*. (See the case of Sandes, petitioner, decided by a Full Bench of the Calcutta

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tions might, under slight restrictions, be renewed every twelve years."

IV. The Supreme Courts. 21 James I, c. 16; 4 Anne, c. 16.

The three Supreme Courts in the three Presidency-towns adopted the English law of limitation as contained in 21 James I, c. 16, and 4 Anne, c. 16, and such adoption was recognised by Her Majesty's Privy Council in *The East India Company* v. *Odit Churan Paul* (5 Moore's I. A., 43) and in *Ruckmabye* v. *Lallubhoy Mottichand* (5 Moore's I. A., 234). These statutes provided that actions of debt grounded on any contract without specialty, and actions for torts (except slander, assault, and imprisonment) must be brought within six years, actions of slander within two years after the time when the slander was uttered, and actions of assault and imprisonment within four years after the cause of action had arisen. The Statute of James I further required an adverse possession of twenty years to bar an action of ejectment. There was no statutable limitation in England, with respect to actions founded on bonds and other specialties, before the 3 and 4 Will. IV, c. 42; but, by analogy to the statute, an artificial presumption of payment or satisfaction at the end of twenty years was applied to such cases.[s]

Exceptions.

Infancy, unsoundness of mind, coverture, imprisonment, and absence beyond the territories at the time of the accrual of the cause of action, were disabilities which entitled the plaintiff to claim exemption from the operation of the Statute of James I. The Statute of Anne introduced a further exception in the case of *defendant's* absence beyond the territories, at the time when the cause of action arose. Acknowledgments and payments made by the debtor were treated by the Courts (though not recognised by the statute) as giving the plaintiff a fresh start, on the ground that, from such acts, a promise to pay might be implied. Simple acknowledgments were subsequently required to be in writing signed by the debtor. (See Act XIV of 1840 extending Lord Tenterden's Act, 9 Geo. IV, c. 14, to India).

Act XIV of 1840.

Sudder Court on the 21st February 1852, at p. 67 of the Reports of that year). A different rule appears to have obtained in the other Presidencies. By a circular of the Bombay Sudder Court it was ruled that no decree should be *summarily* executed after the expiration of one year from its date without first calling upon the opposite party to state his objections if he had any to offer; it then rested with the Judge to admit or reject those objections, and, if no valid objection existed, to direct the execution of the decree. A fresh *regular* suit was necessary if the objections to the execution were admitted by the Judge. (See the Special Reports of the Indian Law Commissioners, 1843, p. 130).

[r] Calcutta S. D. Rep., 1858, pp. 1341, 1580. See p. 58, *infra*.

[s] Darby and Bosanquet, p. 95; Angell, sec. 93.

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The 3 and 4 Will. IV, c. 27 (an Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto), the 3 and 4 Will. IV, c. 42, providing limitations for actions on specialties, and 2 and 3 Will. IV, c. 71, relating to the acquisition of easements and profits by prescription, were never extended to India, and the Supreme Courts did not administer these laws in the Presidency-towns.

It was held in some cases of contract between Hindus that under 21 Geo. III, c. 70, s. 17, the Hindu law of limitation, if any, and not the Statute of James I, was applicable in the Supreme Courts.[9] It was, however, subsequently determined by the Calcutta Supreme Court, that the English law of limitation as a part of the *lex fori* was applicable to all classes of suitors in that Court, and that the Statute of George III had reference only to the *substantive* Hindu law of contracts.[10] This question, which had been determined in the same way by the Supreme Court of Bombay, was, in 1852, conclusively settled by the Privy Council in the case of *Ruckmabye* v. *Mottichand* (5 Moore's I. A., 234). The *lex fori* preferred.

In the Plea Side of the Supreme Court, writs of execution were required to be sued out within a year and a day, after the judgment was entered. But after the year and day, the claimant was allowed to issue a *scire facias* calling on the defendant to show cause why execution should not issue. The proceeding was in the nature of a new action to give effect to the old. An award of execution in pursuance of the *scire facias* revived the judgment.[1] Execution of decrees.

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[9] Krisno Chand Seal *v.* Ramdhone Nundan, 1834, Morton's Reports, p. 345, and other cases in the same Reports.

[10] Beer Chand Poddar *v.* Romanath Tagore, Taylor and Bell, p. 231.

[1] See Asutosh Dutt *v.* Durga Charan Chatterjee, I. L. R., 6 Calc., 504; (S. C.) 8 C. L. R., 23. Since the Common Law Procedure Act of 1852 (15 and 16 Vict., c. 76) the period of a year and a day is, in England, extended to six years, and a writ of revivor is issued in lieu of a *scire facias*. During the lives of the parties to a judgment, execution may now issue as of course at any time within six years from the recovery of the judgment. After that period, or after a change by death or otherwise, before execution can issue upon it, it must be revived by *writ*, or with leave of the Court or a Judge, by *suggestion*. (Broom and Hadley's Commentaries, Vol. III, and Stephen's Commentaries, Vol. III). Before the enactment of Act XIV of 1859 there was no statutory bar by lapse of time to the execution of a judgment of the Supreme Courts, but it was a rule of those Courts, following the practice of the common law Courts of England, that, after the expiration of a year from the date of the judgment, execution could not issue until a writ of *scire facias* had been taken out and served on the judgment-debtor. (In the matter of Candos, I. L. R., 11 Bom., 138, at p. 147). Revivor, and *scire facias*.

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The law of the Supreme Courts compared with that of the Mofussil Courts.

The law of limitation of the Mofussil Courts in each Presidency differed from the English law of limitation which governed the Supreme Courts, not only in the periods of limitation, but in the exceptions to the application of those periods; and also in the principle on which those exceptions, where they were the same, were allowed.[1]

Previous ineffectual proceedings for the matters in dispute, in the mofussil of all the three Presidencies, and fraud in the acquisition of possession in that of Bengal and Bombay, were recognised as exceptions to the ordinary rule of limitation; but such exceptions found no place in the statutes which were administered in the Presidency-towns; while the disability of coverture and the exception in the case of *defendant's* absence in a foreign country,[2] admitted by the English law, had no place in the Indian Regulations. Again, the principle on which the English law had been framed, *viz.*, that when the statute commenced to run it did not cease to run, was unknown to the Regulations.[3] If the person entitled to seek redress, or the person under whom he claimed, was precluded by any disability from obtaining redress, during *any part* of the period of limitation, whether at its commencement or otherwise, the operation of the rule under the Regulations was *suspended*, and the time during which such disability lasted was excluded in computing the period of limitation.[4]

Draft Limitation Bills, 1841-1855.

The anomaly of having one code of laws for the Courts established by Royal Charter, and three other codes for the Mofussil Courts in the three Presidencies, attracted the notice of the Legislature about fifty years ago. In 1841 a Draft Act was prepared with the double object of amending the law of limitation existing in the Courts of the East India Company, and of extending to the Crown Courts in India the amendments introduced into the English law of limitation by the statutes passed in the reign of William IV, and by 1 Vict., c. 28. Subsequently, in 1842, the Indian

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An equity suit in the Supreme Court was revived by a bill of revivor, and latterly by the simpler method of a suggestion introduced by Act VI of 1854, sec. 31. (Attermony Dasee *v.* Hurrydass Dutt, 9 C. L. R., 357).

[2] See Sir James Colvile's Speech in the Legislative Council, 7th July 1855.

[3] Plaintiff's absence in a foreign country at the time when the cause of action arose was considered a "good and sufficient cause" within the meaning of the Bengal Regulations, but the *defendant's* absence was not *per se* a "good and sufficient cause." See Macpherson's Civil Procedure, Appendix; and Bhau Chund *v.* Purtub, 5 W. R., P. C., 31).

[4] Troup *v.* E. I. Company, 7 Moore's I. A., 104; 4 W. R., P. C., 111.

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Law Commissioners, with the concurrence of a majority of the then Judges of the Supreme Courts, proposed to substitute, for the Draft Act of 1841, a uniform law for the acquirement and extinction of rights by prescription and for the limitation of suits, and they drafted a Bill for the purpose. But nothing further was done in the matter until 1855, when Sir J. Colvile moved the first reading of the Commissioners' Bill as slightly amended by himself.[5] In 1859 the provisions relating to prescription were expunged from the Bill, and it was passed as Act XIV of 1859. This Act provided one uniform law of limitation for all the Courts in British India,[6] except, as to proceedings for the execution of decrees of the Supreme Courts, certain suits by mortgagees in those Courts, and suits for public claims under Bengal Regulation II of 1805. The Act *shortened* the periods[7] of limitation allowed by the Regulations and the Statute of James I; laid down rules applicable to the *execution* of decrees; *specified* the grounds of exception[8] to the operation of the ordinary rule of limitation; and rendered *verbal* acknowledgments of liability, or payments by the debtor, ineffectual to keep alive or revive the debt. The principle of English law, that a "legal disability" to be effectual as an exception must exist at the time when the cause of action accrued, was for the first time adopted by this Act. The Act further provided for the *first* time, a limitation to suits for recovery of property against a mortgagee, pawnee, or depositary in the *mofussil*.[8a]

Act XIV of 1859. Changes introduced.

Mortgages and deposits.

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[5] See note 2, p. 48, *supra*.

[6] Kristo Kinkur Ghosh *v.* Buroda Kanta Sing, 17 W. R., 292, P. C.

[7] The *general* periods adopted were twelve years for suits relating to immoveable property, specialties governed by English law, and legacies, and six years for other personal demands. The shorter period of three years was applied to suits for money lent, for breaches of unregistered contracts, for rents, for hire, and for the recovery of property comprised in certain possessory awards. Under the limitation of one year were brought suits for pre-emption, for penalties, for damages not affecting immoveable property, for wages, and for setting aside public sales and summary orders.

Periods of limitation.

[8] The following were the grounds of exception: (1) Legal disability of the plaintiff, including *coverture* in cases governed by English law, minority, idiocy, and lunacy; (2) Ineffectual proceedings *bonâ fide* taken by the plaintiff in a Court *without jurisdiction*; (3) *Defendant's* absence from British India; (4) Written acknowledgments of liability to pay a debt or legacy, *signed* by the defendant; (5) Concealed fraud of the defendant, whether the subject of the suit was immoveable property *or not*. Besides these grounds, which gave the plaintiff an *extension* of time, the Act mentioned another which gave him an *unlimited* time, *viz.*, the relation of trustee and *cestui que trust*. Secs. 11, 14, 13, 4, 9 and 2 of Act XIV of 1859.

Exceptions.

[8a] *Vide* sec. 3, cl. 4, Beng. Reg. II of 1805; paragraph 2, cl. 4, sec. 18, Mad. Reg. II of 1802; cl. 1, sec. 8, Bom. Reg. V of 1827.

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Sir James Colvile proposed to enact specific rules for the acquisition and extinction of rights by *prescription*, but the Act of 1859 provided for the *limitation* of suits only, and as such left untouched the rule of *prescription* contained in Regulation V of 1827 of the Bombay Code.*

Act IX of 1871.

Act XIV of 1859 is couched in language much more precise than the loose phraseology of the earlier Regulations, but the Judicial Committee of the Privy Council did not

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* Maharana Futtehsangji *v.* Dessai Kullianrai, 21 W. R., 178, P. C.; L. R., 1 I. A., 34. That part of Bombay Regulation V of 1827 which referred to prescription was repealed by Act IX of 1871. Before this repeal, the state of the law in the Bombay Presidency was this:—A person who, without title, had been in adverse possession of any immoveable property for twelve years could, under cl. 12, sec. 1 of Act XIV of 1859, resist any suit brought to recover it from him, but no such possession short of thirty years could create a title in his favor under Reg. V of 1827. The proprietor's title, therefore, was not extinguished by another person's adverse possession for twelve years, though his right of suit against that other person was barred by Act XIV of 1859. Accordingly, if such person happened to lose his possession, and the proprietor to regain it, the former, unless he sued within six months under sec. 15 of that Act (=sec. 9, Act I of 1877), must, having no title to stand upon, have failed in any suit to eject the latter. If the Regulation had not fixed a *longer* period of prescription, the original title would have been practically extinguished by Act XIV, and could not have been revived, by a re-entry after twelve years, upon the doctrine of remitter. (See Rambhat *v.* The Collector of Puna, I. L. R., 1 Bom., 592, 598, 599, and p. 3 (note), *supra*). This doctrine of remitter is inapplicable to a right which is wholly remediless, *i.e.*, for which even a droitural real action does not lie. And the doctrine is necessarily inapplicable where the right itself is *extinguished*. (Sibchunder *v.* Sibkissen, 1 Boulnois, 70.; Brindabun *v.* Tarachand, 20 W. R., 114; Brassington *v.* Llewellyn, 27 L. J. Exch., 297). In England, before the abolition of real actions in general (on the 1st of January 1835 by 3 and 4 Will. IV, c. 27), a *droitural* action (that is, an action in which the plaintiff sues in respect of his *mere right*, his *possessory* claim to the land having been lost) was maintainable even *after* a *possessory* action of ejectment had been barred by the Statute of James I. In Bengal no such action was maintainable after the twelve years, and the *right* was wholly *remediless*. The doctrine of remitter therefore had no application in Bengal. In England, rights of *entry* (that is, rights of entering upon and taking possession of lands withheld, if possible without breach of peace) are still recognised. *Such* rights, and rights of *action* to recover lands, are now governed by the same rules not only as to the periods of limitation, but also as to the time from which such periods are to be computed (3 and 4 Will. IV, c. 27, and 37 and 38 Vict., c. 57). Under the Statute of 32 Henry VIII, c. 2, if the plaintiff claimed, not upon his own seisin, but on the seisin of his ancestor, a *possessory action* was governed by a fifty years' and a droitural *action* (by the owner of a fee-simple estate) by a sixty years' limitation. If he claimed upon his own seisin, the period of limitation for both kinds of actions was thirty years. Under the Statute of 21 James I, c. 16, rights of entry, and possessory actions of ejectment, were subject to a limitation of twenty years. By 37 and 38 Vict, c. 57, the period of twenty years has been reduced to 12 years. (Buswell, pp. 15, 385, *et seq*).

Limitation and prescription in Bombay before 1871.

Droitural and possessory *actions*, and rights of *entry*.

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hesitate to characterise it as an "inartificially drawn statute,"[10] and the later Act of 1871 (Act IX) as a "more carefully drawn statute" of limitation.[1]

Act XIV of 1859 had not been in force for ten years when Act IX of 1871 was passed with the object (i) of introducing amendments[2] mainly suggested by the decisions of the Courts upon the Act of 1859, and (ii)

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[10] The Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C.

[1] Maharana Futtehsangji *v.* Dessai Kullianrai, 21 W. R., 178, P. C.

Sir James Colvile, who introduced the original bill, and Sir Barnes Peacock, at whose instance several amendments were made before the bill was passed into law (Act XIV of 1859), were both parties to the judgments in the cases mentioned above.

[2] The following are some of the amendments referred to above :— Amendments introduced by Act IX of 1871.

1. The Courts are required to give effect to the law whether the defence of limitation be pleaded or not. (Under Act XIV of 1859 the rulings on this point were by no means uniform).—Sec. 4, Act IX of 1871.

2. An extension of time is allowed when the period of limitation expires on a day when the Court is closed. (Under Act XIV such extension was not allowable. Rajkristo Roy *v.* Denobundhu Surma, 3 W. R., S. C. C. Rep., p. 5).—Sec. 5, cl. 1.

3. Special laws of limitation are expressly saved from the operation of this general Act. (This is in accordance with the rulings on the subject).—Sec. 6, Act IX.

4. Express provision is made for co-existing or double disabilities. Any mention of the disability arising from coverture is designedly omitted.—Sec. 7, Act IX.

5. It is expressly declared that, in suits on foreign contracts, the *lex fori* shall be preferred to the limitation law of the country where the contract was entered into.—Sec. 12.

6. In computing the period of limitation, the day on which the right to sue accrued is, in every case, to be excluded. (Under the old law the decisions on this subject were not uniform).—Sec. 13.

7. The time during which the commencement of a suit has been stayed by injunction is to be excluded. (This rule is borrowed from sec. 589 of the New York Code).—Sec. 16.

8. The rule of English law, that a right to sue cannot accrue unless there is at the time a person in existence capable of suing, as also a person in existence capable of being sued, is adopted, except in respect of suits for the possession of land or of an hereditary office.—Sec. 18.

9. Amendments of the law relating to acknowledgments and payments (referred to in the text) are introduced by secs. 20 and 21. Acknowledgments must now be made *before* the expiry of the period of limitation. The rule of English law, that the terms of a lost written acknowledgment may be proved by parol evidence, has *not* been adopted.

10. The effect of substituting or adding a new plaintiff or defendant (as ruled in Kissen Lall *v.* Chunder Coomar, W. R., 1864, p. 152; Rajkissoree Dasi *v.* Buddun Chunder, 6 W. R., 298; and Srikissen *v.* Ramkristo, 10 W. R., 317) is declared.—Sec. 22.

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of facilitating the application of the law by a tabular statement of the different sorts[a] of suits and of certain applications, of their respective periods of limitation, and of the exact points of time from which such periods were to run. The expression "so many years *from the time the cause of action arose*" in Act XIV of 1859, sec. 1, clauses 2, 8, 11, 12 and 16, was too vague, at least for the lay public, and Act IX of 1871 attempted to remove this vagueness as much as possible.[a]

No doubt, in many, probably in most, instances, the point adopted as the starting point, was in fact coincident with the accruing of the cause of action, but it was not necessarily so.[a]

Amendments introduced by Act IX of 1871.

11. The English-law rule of computing time where there are successive breaches of contract, a continuing breach or a continuing nuisance, is adopted.—Secs. 23 and 24.

12. The rule laid down by the House of Lords in Bonomi *v.* Backhouse (9 H. L., 503) as to suits for compensation for an act which becomes actionable in case it causes damage is adopted by sec. 25.

13. The decisions of the Bombay High Court, that periods of payment mentioned in instruments bearing a native date should be reckoned according to the native calendar, are in a manner disapproved, and it is laid down that all instruments shall be deemed to be made with reference to the English calendar.—Sec. 26.

14. A rule for the acquisition of easements by positive prescription (referred to in the text) is introduced by secs. 27 and 28.

15. An express rule of extinctive prescription (referred to in the text) is applied to lands and hereditary offices.—Sec. 29.

16. An application to execute a decree within the limited time keeps alive the decree, whether the application be made *bonâ fide* or not, and a new period is allowed from the date of the application or the issue of a notice on the judgment-debtor, but not from the time when a previous *bonâ fide* proceeding terminates.—No. 167, Sched. II, Act IX.

17. Longer time is allowed for the execution of a decree or order of which a certified copy has been registered.—No. 168, Sched. II, Act IX.

[a] But, as observed by Sir Richard Garth in several unreported cases, suits or actions were *individualised* rather than *classified*.

In Essoo *v.* The Savitri (I. L. R., 11 Bom., 133, at p. 135) Justice Jardine observed that Sched. II, Act XV of 1877, had been very *unsystematically* framed. See notes to Arts. 48 & 49, Sched II, Act XV of 1877, *infra*.

In specially mentioning a number of suits which were covered by the *general* clause of Act XIV (*viz.*, cl. 16 of sec. I), Act IX shortened their periods of limitation from six to three years. Suits for *mesne profits*, suits for contribution, and some other suits based on *quasi*-contracts, are instances of this.

[a] Even the term "cause of action" was not used. The words "right to sue" were substituted for it. The term now occurs only in secs. 14 and 24 of the Limitation Act of 1877.

[a] Gobindloll Seal *v.* Debendro Nath Mullick, 5 C. L. R., 527, 531; I. L. R., 5 Calc., 679. See Lecture VIII.

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The Act also repealed and re-enacted the limitation clauses of several special laws, and introduced *new modes* of *interrupting* the operation of the rule of limitation, such as acknowledgments signed by the debtor's *agent*, part-payments, and payment of interest by the debtor or his agent.

To suits by *Government*, it made the *sixty* years' limitation applicable in *all* the Courts and in all the *Presidencies*.

Extinctive and Positive prescription partially introduced.

In analogy to sec. 34 of the English Statute, 3 & 4 Will. IV, c. 27, Act IX further provided for the *extinguishment* of *right* to *land* or hereditary office by lapse of time; and in analogy to 2 & 3 Will. IV, c. 71, it expressly provided for the acquisition of easements by prescription.[a]

Sir James F. Stephen had *proposed* to go further than the English law, and to lay down an *express* rule of positive prescription in respect of *corporeal* property; and although he did not succeed in carrying out his proposal to its full extent, he was able (by the Act of 1871) to obtain, for the first time, some recognition of the doctrine of prescription by the Legislative Council of India, *viz.*, the doctrine of

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Acquisition of easements under the law *before* 1871.

[a] Before Act IX of 1871 came into operation (prescriptive) easements could be acquired in the Presidency-towns by *twenty* years' uninterrupted user acquiesced in by the servient owner, in accordance with the English law which prevailed before the passing of the 2 & 3 Will. IV, c. 71. (Elliott *v.* Bhoobun, 19 W. R., 194, P. C.; Pranjivandas *v.* Mayaram, 1 Bom., 148; Narrotum *v.* Ganapatrav, 8 Bom., O. C. J., 69). In the *mofussil* of the Bombay Presidency enjoyment for a period of more than *thirty* years was required under Reg. V of 1827, sec. 1, cl. 1. (Ram Bhau *v.* Bhai Babushet, 2 Bom., 333; Anaji *v.* Morushet, 2 Bom., 334). Even under Reg. V of 1827 (which applied to the acquisition of immoveable *property* as well as *easements*) it may well be doubted if *mere actual enjoyment* for thirty years was sufficient to establish a right to an *easement*. (See p. 44, *supra*, and Chunilal *v.* Mongaldas, I. L. R., 16 Bom., 592, 595). In the mofussil of the Bengal Presidency, the weight of authority was in favor of the position that, by analogy to the law of limitation, an enjoyment as of right, for at least twelve years, was necessary. (Joyprokash *v.* Ameer Ali, 9 W. R., 91; Mohima *v.* Chundi, 10 W. R, 452; Kartik Sircar *v.* Kartik Day, 11 W. R., 522). In the Madras Presidency a similar opinion was expressed by Scotland, C. J., in Ponnusami *v.* The Collector, 5 Mad., 6; but Justice Innes, in the same case, thought that, there being no common law on the subject, user for a period *shorter* than twelve years, *accompanied* by circumstances indicative of a grant, might be sufficient. (Subramaniya *v.* Ramchandra, I. L. R., 1 Mad., 335). In Kistomohun *v.* Juggurnath, 11 W. R., 236, Jackson and Markby, JJ., expressed a similar opinion. But in Kartik *v.* Kartik, 11 W. R., 522, Bayley and Macpherson, JJ., refused to concur in the proposition laid down in Kistomohun's case. In Rajah Bejoy Kishob Roy *v.* Obhoy Churn Ghose, 16 W. R., 199, Macpherson, J., held that the length of time required in a case of prescription prior to 1st July 1871, was at least twelve years; but Jackson, J., adhered to his opinion that no particular period was necessary.

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extinctive prescription as to land and hereditary offices, and of positive prescription as to easements.

Act XV 1877.

Act IX of 1871 was shortly afterwards replaced by Act XV of 1877, which is the present law on the subject. This Act has extended the principle of extinctive prescription to moveable property, and the principle of positive or acquisitive prescription to profits *à prendre*. It further provides for various applications mentioned in the new Code of Civil Procedure (Act X of 1877, now replaced by Act XIV of 1882), and the schedule of applications in Act XV is accordingly more extensive than the corresponding portion of the Act of 1871. In other respects, too, Act XV is more elaborate than Act IX, and the former is in fact an improved edition of the latter. The following are some of the other additions and alterations introduced by Act XV:—

Additions and alterations introduced by Act XV.

An express declaration that neither Act XV nor Act IX shall be deemed to affect any title acquired, or to revive any right to sue barred, under the latter Act or under Act XIV of 1859.—Sec. 2.

Successive or supervenient disabilities, as well as the disability of legal representatives, have been provided for. —Sec. 7.

The exceptions on account of legal disability, ineffectual but *bonâ fide* proceedings in a Court without jurisdiction, concealed fraud, written acknowledgments, and the non-existence of a person capable of suing or of being sued, as well as the provision as to excluding from computation the day on which the right to sue accrues, have been extended to *applications*.—Secs. 7, 14, 18, 19, 17 and 12.

The Act has been applied to appeals from, and applications to review, decrees and orders of the High Courts in the exercise of their *original* jurisdiction.—Nos. 151 and 162, Sched. ii. (These were formerly regulated by rules made under the Charter of 1865).

Suits to enforce rights of pre-emption have been excluded from the operation of the exception as to legal disabilites, and the exception arising out of the non-existence of a legal representative capable of suing or of being sued.—Secs. 7 and 17.

A purchaser for valuable consideration from an express trustee *whether he had or had not notice* of the trust at the time of the purchase, is protected by twelve years' possession.—Sec. 10.

The time of a defendant's absence from British India is excluded in computing the period of limitation, *whether*

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a summons could or could not be served upon him during such absence.—Sec. 13.

Additions and alterations introduced by Act XV.

A written acknowledgment in respect of *any* matter of right gives a fresh starting point. (Under Acts XIV of 1859 and IX of 1871 acknowledgments were effectual in respect of debts and legacies only).—Sec. 19.

The effect of a part-payment has been extended to all debts *whether arising out of a contract in writing* or *not*. The payment must appear in the handwriting of the debtor or his agent, but it is no longer necessary that the payment should be endorsed on the instrument or on his own books or on the books of the creditor.—Sec. 20.

The cause of action, or rather the right to sue, is renewed *de die in diem* not only in the case of a continuing breach of contract and a continuing nuisance, but also in the case of other continuing wrongs or torts.—Sec. 23.

In the case of suits for money lent under an agreement that it should be payable on demand, time runs from the date of the transaction, instead of from the date of the demand, as prescribed by Act IX.—Nos. 59 and 73, Sched. ii.

The rules as to the estate of Hindu widows, and Hindu managers of joint estates, contained in Nos. 107, 124 and 142 of Schedule ii, Act IX of 1871, are extended to Mahomedans where they have adopted the Hindu law of property.—Nos. 107, 125 and 141, Sched. ii.

Several classes of suits not specified in Act IX of 1871 have been expressly provided for, such as suits to set aside an order releasing or refusing to release property attached in execution (No. 11), suits to restrain waste (No. 41), suits to compel legatees to refund (No. 43), suits by wards to set aside sales by their guardians (No. 44), suits by Hindus for declarations of rights to maintenance (No. 129), and suits by mortgagees for foreclosure or sale (No. 147). The Act has re-enacted the express provision of sec. 21, Act VI of 1874, as to the execution of orders of Her Majesty in Council (No. 180), and has added a general clause to cover applications not otherwise provided for (No. 178).

Certain numbers of Schedule ii, Act IX, have been omitted as useless, such as Nos. 33, 73 and 79 of Act IX. No. 126 of Act IX has been rescinded, because a suit "by a Hindu governed by the law of the Dayabhaga to set aside his father's alienation of ancestral property" does not lie at all. No. 146, relating to suits for declaration of rights to easements, has also been left out. The distinction between applications for the execution of summary decisions, and of decrees or orders passed in Regular suits or appeals, has been abrogated, and No. 166 of Act IX has been omitted.

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Additions and alterations introduced by Act XV of 1877.

The periods of limitation have, in some cases, been *lengthened*, as in suits for infringing an exclusive privilege (No. 11 of Act IX, and No. 40 of Act XV), for taking or wrongfully detaining moveable property (Nos. 26 and 34 of Act IX, and No. 48 of Act XV), for obstructing a way or watercourse, and for diverting a watercourse (Nos. 31 and 32 of Act IX, and Nos. 37 and 38 of Act XV). The limitation *periods* have been *shortened* in a few cases, as in suits for establishing or setting aside an adoption (No. 129 of Act IX, and Nos. 118 and 119 of Act XV), and suits instituted by mortgagees in the Original Side of the High Court for possession of mortgaged immoveable property (No. 149 of Act IX, and No. 146 of Act XV). The *starting point* of limitation has also been altered in some cases, as in suits to enforce a right of pre-emption (No 10, Sched. ii, Acts IX and XV); suits referred to in Nos. 32, 48, 90, 91, 92, 114, 118 and 127 of Act XV, in which the plaintiff's *knowledge* of certain facts is now made an ingredient of his cause of action; suits for money payable on demand (Nos. 59 and 73 of Act XV); suits for redemption, No. 148; and suits in the mofussil by mortgagees for possession of mortgaged immoveable property (No. 135 of Acts IX and XV). Besides, an application to take *any step* in aid of execution of a decree or order, now gives the decree-holder a fresh start.—No. 179 (cl. 4), Act XV.

Amendment of the law as to the age of majority.

Under Act IX of 1871, a *minor* was a person who had not completed his age of *eighteen* years. Act XV of 1877 omits this definition. Act IX of 1875 as modified by sec. 52 of Act VIII of 1890 is the present law as to the age of majority in British India. (See Lecture IX, *infra*).

Amendment introduced by Act X of 1877.

The right of a judgment-creditor to make an *indefinite* number of successive applications for the execution of his decree, so long as it remains unsatisfied (see pp. 47, 48, *supra*) was *cut down* by the Code of Civil Procedure. (See sec. 230 of Acts X of 1877 and XIV of 1882, and notes under Nos. 178 and 179 of Act XV of 1877).

Subsequent amendments of Act XV of 1877.

Act XV of 1877 has been slightly amended by sec. 108 of Act XII of 1879, Act VIII of 1880, sec. 156 of Act V of 1881, sec. 36 of Act IX of 1887, sec. 66 of Act VII of 1888, and sec. 1 of Act VI of 1892. (See Appendix). Paragraphs 1 and 3 of sec. 2, Act XV of 1877, and the first schedule of that Act, have been repealed as rendered unnecessary by lapse of time or otherwise. This repealing Act, XII of 1891, was passed on the 21st March 1891.

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LECTURE IV.

THE PLEAS OF *LACHES*, ACQUIESCENCE, AND LIMITATION.

The doctrine of *laches* in equity—The extent to which it is still applicable—*Laches* distinguished from acquiescence—*Laches* and acquiescence distinguished from limitation and prescription—The effect of *laches* in British India—Holloway, Turner, and West, JJ., on the doctrine of *laches*—Declaratory suits—Suits for specific performance and for injunction—Suits for redemption and mesne profits—Lord Chelmsford on *laches* and acquiescence—Lord Eldon on acquiescence—Act XIV of 1859—Act I of 1877—Conditions necessary to acquiescence—The morality of the plea of *laches* and acquies ence—The morality of the plea of limitation—The plea of limitation, whether it must be set up by the defendant—Under the English law—Under the Regulations of Bengal and Madras—Under Acts XIV and VIII of 1859—Exceptions to the general rule—Under Acts IX of 1871 and XV of 1877—The effect of a previous final decision—The plea of limitation in Courts of first appeal and of second appeal—Prescription need not be pleaded—Limitation may be pleaded even where the right is denied—Limitation against a joint cause of action—Limitation as against a defendant—Where the defendant pleads a set-off—Where the defendant is bound by a summary order—Prescription may be pleaded against a defendant as well as against a plaintiff—Promise not to plead limitation.

ANOTHER doctrine, namely, that of *laches* and acquiescence, which is similar in its operation to the doctrine of limitation and prescription, requires some notice here.

The doctrine of *laches* in equity.

Courts of Equity in England have always, on general principles of their own, discountenanced the *laches* and neglect of suitors, and refused relief unless sued for within a reasonable time and with reasonable diligence.[1] They did so, even before the 21st James I, cap. 16, provided for the limitation of *actions at law*. After the passing of that statute, equity has, except in cases of fraud,[1a] adopted its provisions so far as *analogy*

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[1] "A Court of Equity," said Lord Camden, "by its own proper authority, always maintained a limitation which prevented its being called into activity, unless at the requisition of conscience, good faith, and reasonable diligence." See Brown on Limitation, p. 514.

Is fraud a good replication in *law*?

[1a] The Statute of James I does not provide for cases of fraud, and the weight of authority is decidedly in favor of the position that in *law* fraud will *not* prevent the operation of the statute, however great or however carefully concealed it may have been. There are, however, a few cases in which it has been held that fraud may form a good replication even in *law*. According to Mr. Banning this question is perhaps of little importance since the fusion of law and equity under the provisions of the Judicature Act of 1873. (See Banning, pp. 217-219). And according to Coleridge, C. J., after the passing of the Act of

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makes them applicable to *suits in equity*. And since 1834 some suits, *viz.*, suits to recover land or rent, are directly governed by the express provisions of 3 & 4 Will. IV, cap. 27. (See sec. 24). Where the matter, however, is of a purely equitable[2] nature, to which the statutes do not apply even by analogy, Courts of Equity still apply the doctrine of *laches* according to discretion regulated by precedents and the particular circumstances of the case. If an argument *against* relief, which otherwise would be just, is founded upon simple *laches* or mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of such argument is tried upon principles substantially equitable.[3] Where no new rights and interests have meanwhile come into existence, or where the

The extent to which the doctrine is still applicable.

Fusion of law and equity.

1873, an action at law to recover damages for fraudulent representations, is, strictly speaking, *not* to be regarded as either a common law proceeding or an equity proceeding. It is an action in the High Court of Justice created by the Judicature Act of 1873, by which common law and equity in a certain sense were both abolished, that is to say, the right and principles of both remained, but they were *not* allowed to exist in *conflict* with one another, and the High Court of Justice was ordered to administer justice according to the principles of law and equity *together*, and to give relief according to such principles *concurrently*. Brett, L. J., in the same case, was of opinion that *equitable* principles were applicable to an action for damages for *fraudulent* representations on the ground that, before the Judicature Act, equity had concurrent *jurisdiction* over such matters. (Gibbs *v.* Guild, 9 Q. B. D., 59). But an action to recover damages for *negligence* was formerly a *purely common law* action, and it has been held that equitable principles are *not* applicable to such an action even if it be instituted in the High Court of Justice after the Judicature Act of 1873. (Armstrong *v.* Milburn, 54 L. T., 247). See note 3, *infra*. In *equity* fraud has *always* been a ground of relief, and sec. 26 of 3 and 4 Will. IV, cap. 27, expressly adopted the rule of equity in suits concerning *real* property.

Injunction in aid of a *legal* right not barred by mere delay.

[2] Angell, sec. 26, note. As to the effect of the Judicature Act since 1873, see the preceding note. Where an injunction is sought only in *aid* of a *legal* right (as where the plaintiff sues to restrain the defendants from representing themselves to be carrying on the business which has descended to the plaintiff) *mere delay*, even after the Act of 1873, has just as much effect, and no more, in barring the grant of an injunction as it has in barring an action for the infringement of the legal right—an action in the nature of an action of deceit—which is subject to the English statute of limitations. (Fullwood *v.* Fullwood, 9 Ch. D., 176, at p. 178). So also *mere delay* is no defence to a suit to set aside a conveyance which is invalid at *law*, and which is not sought to be set aside on purely *equitable* grounds. (*In re* Madder, 27 Ch. D., 523). In the case of a *legal* right, the High Court of Justice created by the Judicature Act, cannot refuse relief on the *mere* ground of *delay* unless there has been such delay as to create a *statutory bar*. (*Ibid.*) Cf. note under art. 43, Act XV.

[3] Lindsay Petroleum Company *v.* Hurd, L. R., 5 P. C., 221, at p. 239. The question in this case was whether the plaintiffs had lost their option to rescind a contract by reason of the *delay* which had taken place in the assertion of their right, accompanied with *knowledge* sufficient to make that delay *material*. The Lord Chancellor (Lord

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other party would not be unreasonably prejudiced by the remedy being afterwards asserted, such delay will,

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Selborne) in delivering the judgment of their Lordships of the Privy Council, said: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases, are, the *length* of the delay and the *nature* of the *acts* done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

Lord Selborne, on the doctrine of laches and acquiescence.

Length of delay, and nature of acts done in the interval.

"In order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily—and certainly when the delay has been only such as in the present case (a delay of fifteen months)—necessary, that there should be sufficient knowledge of the facts constituting the title to relief."

Knowledge.

"It is undoubtedly true that a delay which might be available by way of defence to persons not under any fiduciary relation or obligation, might not be available by way of defence to those who are affected by a fiduciary relation or obligation."

Fiduciary relation.

Lord Penzance and Lord Blackburn in Earlanger *v.* New S. P. Company (3 App. Case, 1230, at pp. 1230 and 1279) were of opinion that a more distinct and definite rule than that contained in the first of the above extracts is not to be found in the cases on the subject of laches and delay. Kekewich, J., also refers to this statement of the equitable rule in his judgment in Allcard *v.* Skinner, 36 Ch. D., 145, at p. 163). Lord Penzance (at p. 1231, 3 App. Cas.) says: "Delay, as it seems to me, has two aspects. Lapse of time may so change the condition of the thing sold, or bring about such a state of things that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay, and it is in many cases particularly applicable to property of a mining character. But delay may also imply acquiescence, and in this aspect it equally bars the plaintiff's right, for such a contract, as is now under consideration, is only voidable and not void." Lord O'Hagan, at p. 1259 of the same report, says: "In matters of this kind, every case must be judged according to its own circumstances. In each the question must be one of degree—of more or less—and the delay which might be sufficient to bar relief, in one condition of things, may be without any effect in another." Lord Selborne, at p. 1261, says: "Where acquiescence is a bar to an equitable right (which it may be much more easily than to a legal right, especially in mining cases), two things are generally necessary—first, that there should have been sufficient knowledge of the facts on which the equity depends; and secondly (when a contract is sought to be rescinded), that there should have been substantial freedom of choice and action, independent of the original influence under which the voidable contract was made.

Delay has two aspects.

Delay, a question of degree in each case.

Knowledge and freedom.

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Where plaintiff is required to be prompt.

in general, be no bar to a plaintiff's right to relief.[4] Where the question is not one of *title* to recover property,[5] and the plaintiff at the time of suit has no absolutely *vested right* to the particular relief which he seeks (it being *discretionary* with the Court to grant it or not), the principles of equity, in the absence of a statutory provision, require that the party must come *promptly* and as early as he reasonably can.[5a] One important exception to this rule is the case of a person *in possession* under an equitable title, seeking (in a suit for specific performance) to clothe such title with the legal title. Thus, where a lessee under an agreement for a lease has enjoyed the property for years, if the intended lessor were to refuse the tenant his lease, or any of the benefits which he had a right to enjoy under it, the tenant might always come into a Court of Equity and compel the landlord to grant the lease.[6]

One exception.

Laches should be distinguished from acquiescence.

But mere *laches* should be distinguished from *acquiescence*. "*Laches* and acquiescence," says Mr. Banning, "are *often* inexactly used as *identical* in meaning. In fact, however, there is a great distinction between them."[7] Lapse

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Knowledge and freedom.

The equitable rule so well stated in the judgment of the Privy Council in Lindsay Petroleum Company *v.* Hurd has no application except from the time when the party against whom it is sought to apply it was *sufficiently acquainted with his rights* to enable him to assert them, and when those rights are to avoid gifts obtained by undue influence, *free from that influence*. (Allcard *v.* Skinner, 36 Ch. D., 145, at p. 163).

Purely equitable right.

Where a plaintiff comes to the Court to enforce a *legal* right, his *delay* in taking proceedings is *no* defence, if it has not continued long enough to *bar* his legal right. The case is *different* where the plaintiff endeavours to enforce an *equitable* right, or where relief is sought merely on *equitable grounds*. (*In re* Maddever, 27 Ch. D., 523).

[4] See Jamnadas *v.* Atmaram, I. L. R., 2 Bom., 133, 138.

Messrs. Darby and Bosanquet, citing Pickering *v.* Standford (2 Ves., Jr., 272), at p. 196 of their work, say: "It may be stated, as a general rule, that, where there is a statutory period of limitation, delay for any length of time short of that will not be an absolute bar to a plaintiff's right to relief, except where, by reason of such delay, innocent persons have been allowed to acquire interests which would be prejudiced by such relief being granted."

[5] See Juggernath Sahoo *v.* Syud Shah, L. R., 2 I. A., 48; 23 W. R., 99, P. C.

[5a] Clarke *v.* Hart, 6 H. L. C., 633. The rule that a plaintiff must be *prompt* applies to the *discretionary* jurisdiction of the Court. (Fullwood *v.* Fullwood, 9 Ch. D., 176, at p. 178).

[6] Crofton *v.* Ormsby, 2 Sch. and Lef., 583, 603; and Ahmed Mahomed *v.* Adjein, I. L. R., 2 Calc., 323, 326.

[7] Banning on Limitation, p. 246. Acquiescence means a standing by with a knowledge of one's rights, and is a matter quite distinct from mere delay. Per West and Haridas, JJ., 1883, Branson's Digest of Printed Judgments, Bombay, 99.

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of time or delay in suing, unaccounted for by disability, ignorance (of fact, if not of law) or other circumstances, constitutes *laches*.[8] *Laches* is merely passive, while even indirect acquiescence implies almost active assent.[9] *Laches*, or delay, is evidence of acquiescence *when* the conduct of the parties, during the interval, raises a presumption of assent.[10] Acquiescence—that is, indirect acquiescence—has been defined as *quiescence under such circumstances as that assent may be reasonably inferred from it*, and as such, is no more than an instance of the law of *estoppel* by words or conduct.[11]

Laches, merely *passive*.

Acquiescence implies assent.

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[8] Lewin on Trusts, 7th Ed., p. 743; Darby and Bosanquet, pp. 196 and 197. *Laches* means *doing nothing*. (Per Chitty, J., *In re* Birch, 27 Ch. D., 622, at p. 627).

[9] Banning, p. 246; Lewin, p. 744. In Rajan *v.* Basuva (2 Mad., 428, at pp. 429 and 430. Holloway, J., uses the expression "*passive* acquiescence" for the term "laches." And in Peddamuthulaty *v.* N. T. Reddy, 2 Mad., 270, the same learned Judge speaks of *acquiescence* proper, as equivalent to *absolute* or *positive waiver*. Acquiescence proper amounts to a *constructive* grant of a right. (Holland *v.* Worby, 26 Ch. D., 578).

Acquiescence amounts to waiver, and constructive grant.

[10] During the *argument* in Benode Coomaree's case, Petheram, C. J., is reported to have said: "I think inaction is evidence of acquiescence." (I. L. R., 16 Calc., 252, at p. 261). But mere inaction under such circumstances as that assent may *not* reasonably be *inferred* from it, is *quiescence* not *acquiescence*. Even if bare delay be evidence of knowledge, *assent* cannot be inferred from *mere knowledge*. Assent can not be inferred from *mere* knowledge.

"Lord Cranworth in a recent case points out the absurdity of concluding that a man assented to a contract, because when he was never asked, he never expressed assent or dissent." (Per Holloway, J., Rajan *v.* Basuva, 2 Mad., 428, at p. 431).

[11] *Per* Thesiger, L. J., in De Bussche *v.* Alt., 8 Ch. D., 286, at p. 314. Direct acquiescence is where the act complained of was done with full knowledge and *express* approbation of another, in which case a Court of Equity will not allow that other to seek relief against the very transaction to which he was himself a party. Indirect acquiescence is where a person, having a right to set aside a transaction, *stands by* and sees another dealing with property in a manner inconsistent with that right, and makes no objection, when also a Court of Equity will not relieve; but in the latter case the Court not only looks to the conduct of the person who stands by, but also considers how far the person in possession of the property has any just claims to the protection of the Court. Where, for instance, the possessor lays out his money with a full knowledge that the property which he improves belongs to another, then it is said he makes the outlay to his own cost. (See Lewin on Trusts, pp. 744, 745). It may be here observed that in British India, if the person who makes the improvement is not a mere trespasser, but is in possession under any *bonâ fide* claim of an absolute title, he is entitled (at the option of the lawful owner) either to remove the materials or to obtain compensation for the value of the improvement, *independently* of any proof of acquiescence on the part of the owner. (Thakoor Chunder *v.* Ramdhone, 6 W. R., 228, F. B. See also sec. 51 of Act IV of 1882, the Transfer of Property Act, Shephard's commentaries, pp. 126, 127; and sec. 2, Act XI of 1855, which mitigated the rigour of the English law on this subject).

Direct and indirect acquiescence.

Expensive improvements.

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Acquiescence, an estoppel *in pais.*

The doctrine of acquiescence (proper) is based on the rule of estoppel *in pais.*[1] This rule is precisely the *same* at *law* and in *equity* as was stated by Lord St. Leonards in the case of *Bargate* v. *Shortridge*, and by all the Law Lords in *Clarke* v. *Hart.*[1a]

Generally speaking, the rule is that, if a man, either by words or conduct, intimates that he consents to an act which is about to be committed, or is being committed, and that he will offer no opposition to it, although it cannot be lawfully done without his consent, and he thereby induces others to do that from which they otherwise may have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. If a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position

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Acquiescence, a flexible term.

"Acquiescence" is a very flexible term, and open to the criticism which it underwent in De Bussche *v.* Alt. (*Per* Bacon, V. C., in Blake *v.* Gale, 31 Ch. D., 196, at p. 210. See also note 2, *supra*). According to Lords Justices James, Baggallay, and Thesiger, the term does not accurately express any known legal defence. If the term is used at all, it must have attached to it a very different signification according to whether the acquiescence alleged occurs while the act acquiesced in is in *progress*, or only *after* it has been *completed.* If the acquiescence occurs while the act is about to be committed, or while it is in progress, it operates by way of estoppel. But when once the act is *completed*, *without any knowledge or assent* on the part of the person whose right is infringed, a *right* of action *vests* in him, which, as a general rule, cannot be divested without accord and satisfaction, or a legal release. Mere submission to the injury for any time short of the period of limitation cannot take away any such right, although under the name of *laches* it may afford a ground for refusing relief under some particular circumstances. It is also clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury already done to him could not by itself constitute a bar to such proceedings. Such a promise would be without consideration, and therefore not binding. (See De Bussche *v.* Alt., 8 Ch. D., 286). "What Jervis, C. J., called the 'abominable standing by doctrine' is clearly inapplicable to a standing by *after the event.*" (Per Holloway, J., in Peddamuthulaty *v.* N. Timmer Reddy, 2 Mad., 270, 271).

Acquiescence, *before* the act is completed, operates as an estoppel.

Promise not to sue.

Three kinds of estoppel.

[1] See Uda Begum *v.* Imamuddin, I. L. R., 1 All., 82. Sec. 115 of the Indian Evidence Act is concerned with estoppels *in pais*, as opposed to estoppels by matter of record and estoppels by deed. He, who by his acquiescence induces another to change his position, or to lay out money, must make his tacit representation good, just as he would be bound to make good an active representation leading to a similar outlay. Branson's Dig., P. J., 99, referred to in note (7), p. 58. See also 8 Ch. D., 286, at p. 314, cited above.

Estoppels *in pais* are equitable estoppels.

[1a] Per Holloway, J., in Peddamuthulaty *v.* N. T. Reddy, 2 Mad., 270, at p. 274. See also Mayne's Hindu Law, sec. 148.

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of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license. (See *Cairncross* v. *Lorimer*, 3 Macq. H. L. C., 892).[2] If a person, having a right, stands by and sees another dealing with the property inconsistently with that right, and makes no objection while the act is in *progress*, he cannot afterwards complain. That is properly acquiescence. (*Per* Lord Cottenham in *Duke of Leeds* v. *Earl Amherst*, 2 Phill., 117, 123).[3] If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce. (*Per* Lord Wensleydale in *Archbold* v. *Scully*, 9 H. L. C., 348, 383).[4] The party so acquiescing cannot afterwards insist on his strict legal right; it would be *unconscionable* to do so, and interference on his behalf would be refused, even though his right to sue might not be barred by any law of limitation.[5]

Equitable estoppel.

Implied permission to alter condition.

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[2] See Uda Begum v. Imamuddin, I. L. R., 1 All., 85.

[3] See Brown, p. 516; and Banning, p. 245. Acquiescence, in its proper sense, can occur only *before* the act is *completed*. De Bussche v. Alt., 8 Ch. D., 286, at p. 314.

[4] See Darby and Bosanquet, p. 197.

[5] The doctrine of estoppels *in pais* or equitable estoppels is based upon a fraudulent purpose, and a fraudulent result. There must be deception, and change of conduct in consequence, to estop the party from showing the truth. (Story, sec. 1543; I. L. R., 1 All., 82, at p. 85). In the absence of any *misleading* or any *consent* on the part of the plaintiff, his right is not lost by mere *laches*. (Per Chetty, J., *In re* Birch, 27 Ch. D., 622, at p. 630).

Principle on which estoppels *in pais* are based.

But no consent or acquiescence can enlarge the *jurisdiction* and powers of the Court (Srimati Anundo Moye v. Dhurendro, 1 W. R., 103, 106; Aukhil v. Mohiny, I. L. R., 5 Calc., 489; Quiros' case, I. L. R., 6 Calc., 83); nor, generally speaking, alter the nature and operation of a decree in execution. (Roy Bhoopendro Nath Chowdhri v. Kalee Prossunno Ghose, 24 W. R., 205; Bindaprasad v. Ahmad Ali, I. L. R., 1 All., 368, but see Sadasiv v. Ramalinga, 24 W. R., 193, 197, P. C.) Where jurisdiction over the *subject-matter* exists, requiring only to be invoked in a *particular mode*, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards challenge the legality of the proceedings due to his own invitation or negligence. But if there is no inherent jurisdiction over the subject-matter, the acquiescence of the parties concerned cannot create it. (Vishnu v. Krishnarao, I. L. R., 11 Bom., 153). See also Ledgard v. Bull, I. L. R., 9 All., 191, P. C.; Minakshi v. Subramanya, I. L. R., 11 Mad., 26; Sankumani v. Ikoran, I. L. R., 13 Mad., 211; Bibi Ladli v. Bibi Raji, I. L. R., 13 Bom., 650). Irregularity in the initial proceedings upon which a Court having jurisdiction, exercised jurisdiction may be *cured* by waiver (or acquiescence) though such irregularity might have been made a valid ground of objection to the exercise of jurisdiction. (I. L. R., 13 Mad., 211). If theCourt is a Court of *general* jurisdiction,

Jurisdiction of Court, *not* enlarged by acquiescence.

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Laches and acquiescence distinguished from limitation and prescription.

Laches, like limitation, practically deprives the plaintiff of his *remedy*. Acquiescence, like prescription, virtually destroys his *right*. But *laches* and acquiescence depend upon general principles, while limitation and prescription depend upon express law. The former are conclusions drawn from the facts of each particular case, while the latter are matters of inflexible law. A positive law of limitation and prescription applies even when there is no actual *laches* or acquiescence.

Laches and acquiescence, again, may be pleaded against either a plaintiff or a defendant, but limitation may, in general, be pleaded against a plaintiff only.

The effect of *laches* in British India.

As the law of limitation in British India is directly applicable to all kinds of *actions* and *suits*, simple *laches* or delay for any length of time, short of the law-defined period, will *not* be an *absolute bar* to a plaintiff's suit for relief.[a] But a considerable delay, if unexplained, may raise a presumption[b] against the right which the plaintiff seeks to enforce, and induce the Court to look with very great jealousy at the evidence produced in support of it.[c] Such *laches* may also be a ground for refusing a relief which the Court has a *discretion* to grant or refuse,[d] specially where innocent persons would be

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as the District Court is, and the order of such Court is not set aside on review or appeal, it cannot be canvassed in a *collateral* enquiry (Narohari *v.* Annapurnabai, I. L. R., 11 Bom., 160, at p. 171).

[a] "Where there is a statute of limitations, the objection of simple *laches* does not apply." (See Archbold *v.* Scully, 9 H. L. C., 348). "Mere laches short of the period prescribed by the statute of limitation is no bar whatever to the enforcement of a right *absolutely vested* in the plaintiffs at the period of suit." (Per Holloway, J., 2 Mad., 270, at p. 273. *Except*, in cases where the plaintiff seeks a kind of *relief* which the Court has *discretion* to grant or refuse. (Uda Begum *v.* Imamuddin, I. L. R., 1 All., 82, at p. 86). See also Jagurnath Sahu *v.* Syah Shah, 23 W. R., 99; and Jamnadas *v.* Atmaram, I. L. R., 2 Bom., 133, 138.

[b] Modhusudan Sandial *v.* Suroop Chandra Sircar, 7 W. R., P. C., 73. See also Cal. Sud. Sel. Rep., Vol. V, p. 123, and Vol. IV, pp. 89, 130, cited in Macpherson's Civil Procedure Appx., 203; and Sham Chand *v.* Kishen Prosad, 18 W. R., 4, P. C. Such a presumption, however, is not pressed against an infant or a Hindu female. (Ramamani *v.* Kulanthai, 17 W. R., 1, P. C.) See note 2, *infra*.

[c] Musst. Ameerunnissa *v.* Musst. Ashruffunessa, 17 W. R., 259, P. C.

Discretionary relief.

[d] The jurisdiction of the Courts in India to decree the specific performance of contracts and the rectification or cancellation of instruments, to grant injunctions, and to make declarations of status or right, is discretionary. (Act I of 1877, secs. 12, 22, 31, 42 and 52). See Mrinomoyee *v.* Bhuban Moye, 23 W. R., 42; Makund Lall *v.* Chotay Lall, I. L. R., 10 Calc., 1061; Uda Begum *v.* Imamuddin, I. L. R., 1 All., 82.

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unduly prejudiced by such relief being granted.[1a] And where the case is one to which the law of limitation does not extend (as where the *defendant* is guilty of laches)[1] long unexplained delay in enforcing a particular right may be the basis of a *conclusive* presumption of a release or of something done which, if done, is subversive of the right.[2] Where there is a statutable bar applicable to an analogous case, the Court will not, as a general rule, entertain such a presumption within a less time than the period fixed by the statute.[3]

Defendant's laches.

Where mere laches is insufficient to exclude a claimant from relief, it may yet be ground for depriving him of costs,[4] or for reducing the rate of interest claimed, when such interest is awarded by way of damages.[4a]

Costs and interest.

The doctrine of *laches* and acquiescence in India has been fully discussed in *Uda Begum* v. *Imamuddin* (I. L. R., 1 All., 82) and in *Peddamuthulaty* v. *N. Timma Reddy* (2 Mad., 270). Mr. Justice Holloway, in the latter case, lays down that, where the statute of limitation applies, mere *laches* short of the prescribed period is no bar whatever to the enforcement of *a right absolutely vested* in the plaintiff at the period of suit. Mr. Justice Turner, in the other case, assents to this dictum with the qualification that it applies to cases in which a suitor seeks some relief, which, if he proves his case, the Court is *bound* to grant, and has no discretion to refuse. In a Bombay case—*Jamnadas* v. *Atmaram* (I. L. R., 2 Bom., 133)—Justice West lays down that, even where a plaintiff sues for a mandatory injunction, his legal right to relief continues until it is barred by limitation, that the Courts cannot lay down any shorter

Holloway, Turner, and West, JJ., on the doctrine of *laches*.

[1a] Pickering *v.* Stamford, 2 Ves., Jr., 272. See also Lindsay Petroleum Company *v.* Hurd (L. R., 5 P. C., 239) and Durell *v.* Pritchard (L. R., 1 Ch., 244), both of which are referred to in Jamnadas *v.* Atmaram, I. L. R., 2 Bom., 133, where the Court held that an unexplained *delay* of about a year (after protest, &c.), which is not shown to have *prejudiced* the defendant, does not disentitle the plaintiff to a mandatory injunction for the demolition of a building erected so as materially to obstruct the plaintiff's light. But compare the case referred to in note 5*a*, *infra*.

[1] Ram Narain Chakerbutty *v.* Poolin Behary, 2 C. L. R., 5. See also Sunt Lall *v.* Bhurosee, 18 W. R., 57.

[2] Lewin, p. 735. Mere laches in bringing a suit, *may* be a ground in certain cases, for inferring that the right claimed is non-existent. See (Sham Chand *v.* Kishen, 18 W. R., 4, P. C.) See also Ameeroonissa *v.* Ashruff, 17 W. R., 259, P. C.; and note 7, *supra*.

[3] *Ibid.*, p. 740.

[4] Archbold *v.* Scully, Brown, p. 515; Mohun *v.* Debee, 2 W. R., P. C., 9.

[4a] Juala *v.* Khuman, I. L. R., 2 All., 617.

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period for its assertion, and that even the *discretional* power of the Court as to *injunctions* cannot, by reason of *mere delay*, be exercised against the plaintiff, *except* where new rights and interests have meanwhile come into existence, or where the other party will be unduly prejudiced by the relief being granted after such delay. In this case the plaintiff had given full notice, warning the defendants not to build their house so as to obstruct the access of light and air to his house, and, as he had been *protesting* against his rights being interfered with, his conduct did not imply anything like *acquiescence*.[5] A mere *delay* of about two years from the time when the building was commenced, and of about one year from the time when it was completed in the *absence* of any *special* circumstances, did not, it was held, disentitle the plaintiff to the mandatory injunction prayed for. But according to Mr. Justice Wilson of the Calcutta High Court, the English and Indian cases about injunctions for the removal of *completed* buildings lay down the law differently. According to these cases, such injunctions, should not, as a rule, be granted, if there has been avoidable *delay*, although the plaintiff has *not* waived his rights by *acquiescence*, and although he had given notice and protested against the erection of the building. According to Mr. Justice Wilson, it is now well settled that if the plaintiff has not brought his *suit* or *applied* for an injunction at the *earliest opportunity*, but has waited till the building has been finished, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, though there might be cases where it would be.[5a]

Mandatory injunction for the removal of completed buildings.

Declaratory suits.

In *Mrino Moyee Dabee* v. *Bhubon Moyee Dabee* (23 W. R., 42, 44) Sir Richard Couch, C. J., expressed an opinion to the effect that, in a *declaratory* suit, the Court will, in the exercise of the *discretion* which it has, decline (in the absence of special circumstances) to make a decree, even if a lesser time than the full period of limitation has elapsed.

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[5] Jamnadas *v.* Atmaram, I. L. R., 2 Bom., 133.

[5a] See Benode *v.* Soudaminy, I. L. R., 16 Calc., 252, at pp. 265 and 266. This case was decided in 1889, and it was held by Petheram, C. J., and Wilson, J., that a *mere notice* not to continue to build so as to obstruct the plaintiff's rights is not, when not followed, as soon as practicable, by *legal proceedings*, a sufficiently special circumstance for granting a mandatory injunction for the *removal* of a *completed* building. *Delay* in *applying* for *such* an *injunction* is generally though not necessarily a bar to the granting of *such relief*. (Benode *v.* Soudaminy, I. L. R., 16 Calc., 252). But it may be *otherwise* in suits for *other relief*. See note 2, p. 60, *supra*. Where an *injunction* is refused on the ground of the plaintiff's laches or delay, the Court may allow him to recover *damages* for the injury. (See Benode *v.* Soudaminy, I. L. R., 16 Calc., at p. 264, and Goddard, 4th Ed., p. 436).

Other injunctions.

Damages.

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Interim injunction.

In an application by a charterer against the master of a ship for an *interim* injunction, Justice West said: "I am the more disposed to refuse the application here, because it might have been made three days ago, and is now made quite at the eleventh hour (*Haji Abdul* v. *Haji Abdull Bacha* (I. L. R., 6 Bom., 5). In *Ahmed* v. *Adjein* (I. L. R., 2 Calc., 323) Sir Richard Garth assumes that the doctrine of *laches* does apply to a suit for the specific performance of a contract, even if it is brought within the statutory period of three years.[a]

Specific performance.

Question of laches in second appeal.

In *Mokund Lall* v. *Chotay Lall*, I. L. R., 10 Calc., 1061, there was a delay of two years and eleven months, and Mitter and Pigot, JJ., held that, though in a suit for specific performance, the question of plaintiff's *laches* ought to be considered by the Courts, yet, the point not having been taken in the Courts below, the High Court in second appeal could not dismiss the suit, for it could not be laid down as a proposition of law that *all* suits for specific performance brought after the lapse of two years and eleven months are liable to be dismissed.

Suit for redemption and mesne profits.

In a suit by the representatives of a mortgagor, instituted more than fifty years after the mortgage, for recovery of possession of the mortgaged property, with six years' mesne profits, on the ground that the mortgage-debt had been satisfied by the usufruct of the property, their Lordships of the Privy Council, referring to the main question in the case, say: "The question is one of *title*, and the right to assert that title is to be determined by the law of limitation as it stands. The law wisely or unwisely has given to mortgagors the long period of sixty years within which to bring their suit, and no Court of Justice would be justified in diminishing that period on the ground of the *laches* of the party in the prosecution of his rights." But the defendants, who were in possession for about eleven years, being (innocent) purchasers for a valuable consideration without notice of the plaintiff's title, their Lordships, in the exercise of their discretion, refused to award any mesne profits before the date of suit, on the ground of plaintiff's very great *laches*, although the claim for such profits was not barred by Act XIV of 1859, the law of limitation then in

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[a] In England, the Legislature has not prescribed any period of limitation to suits for specific performance. There, a delay of nearly 20 months was considered to be fatal in one case. In another case, where one party to the contract had given notice to the other that he would not perform it, a delay of five months was held to exclude the intervention of the Court. Fry on Specific Performance, 2nd Ed., secs. 1078, 1079.

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force. (*Jugurnath Shahu* v. *Syed Shah Mahammed*, 23 W. R., 99, P. C.) As mesne profits are in the nature of damages, the plaintiffs had no absolutely vested right to them at the date of suit, and it was considered inequitable to award them under the circumstances of the case.[7]

Lord Chelmsford on *laches*.

The principles which guide Courts of Equity in England[8] are thus stated by Lord Chelmsford:—"When a person is obliged to apply for the *peculiar relief* afforded by a Court of Equity to enforce the performance of an agreement, or to declare a trust, or to obtain any other right of which he is *not in possession*, and which may be described as an *executory* interest, it is an invariable principle of the Court that the party must come promptly, that there must be no unreasonable delay, and, if there is anything that amounts to *laches* on his part, Courts of Equity have always refused relief. With regard to interests which are *executed*, the consideration is entirely different. There mere *laches* will not of itself disentitle the party to relief from a Court of Equity, but a party may by *standing by*, as it has been metaphorically called, waive or abandon any right which he may possess, and which, under the circumstances therefore, Courts of Equity may say he is not entitled to enforce; where, therefore, on principles *peculiarly* equitable, a person applies to a Court of Equity to do for him that to which his *bare vested rights* would not entitle him to, a Court of Equity is entitled to say, and does say, 'you are entitled to no favor; you were bound to come within a reasonable time.'"[9]

Lord Eldon on acquiescence.

The rule as to acquiescence is thus illustrated by Lord Eldon in *Dann* v. *Spurrier* (7 Ves., 231, at p. 235):—"The Court will not permit a man knowingly, though passively

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[7] In Nilcomul v. Gunomonee (15 W. R., P. C., 38, 41) it was considered open to the defendant to show any special case, by way of appeal to the *equity of the Court*, to shorten the account which otherwise would have to be taken of the mesne profits claimed by the plaintiff. Mr. Justice Shephard, in his commentaries on the Transfer of Property Act, pp. 125, 126, says that the Courts of Equity followed the Roman law in absolving the *bonâ fide* possessor from liability to account for mesne profits.

[8] The Plea Side and the Equity Side of the Supreme Courts in the Presidency-towns represented, respectively, the Common Law Courts and the Equity Courts of England. The High Court, in its Original Side, exercises both jurisdictions. Since the Judicature Act of 1873, there has been a fusion of law and equity in England. (See notes 1α and 2, pp. 59, 60, *supra*). The Mofussil Courts here were, and are still, in one sense, Courts of law as well as of equity. But the elastic principles of justice, equity, and good conscience administered by the Mofussil Courts in cases not governed by express law, are not necessarily identical with the rigid system of English Equity. (See Markby, secs. 119—124).

[9] Clarke v. Hart, 6 H. L. C., 633.

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to encourage another to lay out money under an erroneous opinion of title (and the circumstance of looking on is in many cases as strong as using terms of encouragement)— a lessor knowing and permitting those works which the lessee would not have done, and the other must conceive that he would not have done, but upon an expectation that the lessor would not have thrown any obstacle in the way of his enjoyment. When a man builds a house on land, supposing it to be his own, and believing that he has a good title, and the real owner perceiving his mistake *abstains from setting him right*, and leaves him to persevere in his error, a Court of Equity will not allow the real owner to assert his legal right against the other without at least making him full compensation for the money he has expended."[10] Under such circumstances equity considers it *dishonest* in the owner to remain wilfully passive, and afterwards to interfere and take the profit.[1] But if the element of *fraud* (actual or constructive) is wanting, as if both parties are equally cognizant of the facts, and the declaration or silence of the one party produced no change in the conduct of the other, he acting solely on his own judgment, there is no equitable estoppel.[2] If a stranger builds on the land of another *knowingly*, there is no principle of equity which prevents the owner from insisting on having back his land, with all the additional value of the land which the occupier has imprudently added to it. And if a tenant does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.[3] But it might be otherwise if the lessor's *conduct induced a*

Acquiescence.

Element of fraud.

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[10] See Ranee Rama *v.* Jan Mahmud (11 W. R., 574); and Gale on Easements, 5th Ed., p. 78. In Langlois *v.* Rattray (3 C. L. R., 1) Garth, C. J., says: "It is the deceit and fraud of the rightful owner in these cases which is the foundation of the rule of equity, and such fraud and deceit must be very clearly proved."

[1] *Per* Lord Chancellor Cranworth in Ramsden *v.* Dyson, L. R., 1 H. L., 129, 140.

[2] Story's Equity Jurisprudence, Vol. II, sec. 1543; Langlois *v.* Rattray, 3 C. L. R., 1.

[3] Ramsden *v.* Dyson, L. R., 1 H. L., 129, 140. But in the mofussil, if not in the Presidency-towns, of British India, even if there has been *no acquiescence* on the part of the landlord, the tenant may pull down and remove buildings erected by him, or claim compensation for the outlay incurred. (Russickloll *v.* Lokenath, I. L. R., 5 Calc., 688; Juggutmohinee *v.* Dwarkanath, I. L. R., 8 Calc., 582. See note 10, p. 63, *supra*).

Tenants in British India.

Where the defendant builds upon land, and thereby obstructs the plaintiff's easements over that land *knowing* that he has no right to obstruct such easement, no question of *acquiescence* can arise. (Fatehyab *v.* Mohammed, I. L. R., 9 All., 434).

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reasonable expectation that he would not throw any obstacle in the way of the tenant's enjoyment.[4]

Act XIV of 1859.

Act XIV of 1859, sec. 16 (corresponding to 3 & 4 Will. IV, ch. 27, sec. 27) expressly provided that the limitation law therein enacted was not to interfere with any rule or jurisdiction of the Courts established by Royal Charter, in refusing equitable relief on the ground of acquiescence or otherwise. This provision in favor of the Supreme Courts might lend some colour to the contention that the equitable doctrine of acquiescence was not applicable to suits in the Mofussil Courts.[5]

Act I of 1877.

But the doctrine of acquiescence operating as an equitable estoppel is, on general principles, applicable to suitors in *every* Court, and cannot be restricted by a doubtful implication.[6] And now the Specific Relief Act, sec. 56,

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[4] Dann *v.* Spurrier, cited above; see Banee Madhub *v.* Joykissen, 12 W. R., 495; Lalla Gopee *v.* Shaikh Liakut, 25 W. R., 211; and cf. Prossunno *v.* Juggunath, 10 C. L. R., 25. If a landlord or his agent *stands by* for a considerable time and allows the tenant to change the character of the land, and lay out his money and labor upon the land without any objection, this is such *conduct* on his part as would (under cl. *j*, sec. 56 of the Specific Relief Act) disentitle him to an injunction, even if it be proved that he never *expressly* consented to the tenant's acts—Ramnarain *v.* Monee Bibee, I. L. R., 9 Calc., 613.

[5] See Ram Rau *v.* Raja Rau, 2 Mad., 114. At p. 116, Scotland, C. J., says: "the equitable doctrine of laches and acquiescence is not applicable to suits in the mofussil, for which a period of limitation is provided by the Limitation Act." Turner, C. J., impugns this dictum. (See Uda Begum *v.* Imamuddin, I. L. R., 1 All., 82). Mr. Justice Holloway treats this dictum of Scotland, C. J., as referring to "mere *passive* acquiescence, or delay." (See Rajan *v.* Basuva, 2 Mad., 428, at p. 429). Mr. Justice Kemp, in Taruk Chander Bhuttacharjee *v.* Hurro Sunker Sandyal (22 W. R., 267), says that the doctrine of acquiescence does not apply to this country. But the facts of the case do not show anything more than *delay* in bringing the suit. See also Rampal Shahoo *v.* Misru Lal (24 W. R., 97) and Sheikh Ally Hossein *v.* Sheikh Muzhur Hossein, 4 C. L. R., 577. In the former case a question of *laches* and implied consent was raised, and it was broadly laid down that, as our Courts have no discretionary power in the matter of granting reliefs, a right not affected by limitation cannot be dismissed on the ground of mere *delay*. In the latter case one of the learned Judges held that the doctrine of *laches* of the English Courts of Equity does not apply to this country.

[6] It may be here observed that the provision of sec. 16 of Act XIV of 1859 was not re-enacted in Acts IX of 1871 and XV of 1877, and that, in Sir James Colvile's Bill, sec. 16 of Act XIV of 1859 was not confined to the Supreme Courts. Section 24 of the original Bill and sec. 27 of the revised Bill ran as follows:—"Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of *any* Court in refusing equitable relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act." The words "established by Royal Charter" were added to the word "Court" at the time of the passing

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cl. (*h*), expressly enacts that, where there is a *continuing* breach of an obligation (whether arising out of a contract or not), an injunction to prevent it cannot be granted, if the applicant has *acquiesced* in it. Where there is more than mere *laches*, where there is conduct or language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled, in the mofussil as elsewhere, to plead acquiescence; and the plea, if sufficiently proved, ought to be held a good answer to an action, although the plaintiff may have brought his suit within the period prescribed by the law of limitation.[7]

Acquiescence proper, a good plea everywhere.

In order that acquiescence may have the effect mentioned above, the following conditions must be fulfilled[8]:—

Conditions necessary to acquiescence.

(*a*). The party acquiescing must be *sui juris*, and not an infant or a lunatic. Acquiescence by *one* of several plaintiffs (the others being infants) may be a bar to the interference of the Court—*Marker* v. *Marker*, 9 Hare, 16.

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of the Bill. The Indian Law Commissioners, in their Report dated the 1st October 1842, say:—"We have introduced a provision corresponding with sec. 27 of the Statute 3 & 4 Will. IV, cap. 27, to preserve any rule or jurisdiction of any Court by which equitable relief may be refused on the ground of acquiescence or otherwise in the party seeking it. This provision seems to be necessary with respect to Her Majesty's Courts; while it may be applicable also in cases falling under the jurisdiction of the Company's Courts. For example, in the case of a person suing in one of the Company's Courts to recover land of which, through fraud or mistake, he had been led to make a conveyance to another, praying that the conveyance may be considered void on the ground of such fraud or error, if it should appear that he had been for some time aware of the alleged fraud or error, and that he had notwithstanding by his conduct acquiesced in the adverse possession, as by encouraging the possessor to build upon the land, or otherwise to lay out money in improving it, we conceive that the Court would think itself justified in refusing the remedy and relief sought by him, although not barred by prescription, on the ground that he had by overt acts given an after-confirmation to the deed which his plaint impugned." See Thompson on the Indian law of limitation, 2nd Ed., p. 302.

[7] Uda Begum *v.* Imamuddin (I. L. R., 1 All., 82), where the Allahabad Court quotes Cairncross *v.* Lorimer, 3 Macq. H. L. C., 829, and Ramsden *v.* Dyson, L. R., 1 H. L., 129. See also 2 Mad., 428.

[8] See Lewin on Trusts, 7th Ed., pp. 450, 789 and 790; Brown on Limitation, p. 516; Darby and Bosanquet, p. 197.

The doctrine of acquiescence is founded upon conduct with a knowledge of one's legal rights. The acquiescence which will deprive a man of his legal rights must amount to *fraud*. The following are necessary elements to constitute such acquiescence as will make it fraudulent for a man to set up his legal rights: (1) *A* must have made a mistake as to his legal rights; (2) he must have laid out money or done some act on the faith of such mistaken belief; (3) *B* must have known of his own right, which is inconsistent with that claimed by *A*; (4) *B* must have known of *A's* mistaken belief as to his (*A's*) rights; and

Necessary elements of acquiescence.

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(*b*). He must have full knowledge or the means of knowledge of the material facts and circumstances of the case. (Knowledge on the part of an agent, may be constructive knowledge on the part of the principal).[9]

(*c*). He must also, to a certain extent, be apprized of the law, or how the facts of the case would be dealt with if brought before a Court of Equity. (In the Courts of *Common Law* this condition would be inconsistent with the general rule that a mistake of law is no excuse).

The plea of *laches*, as well as that of acquiescence proper, requires for its validity a finding of fact under all the circumstances of *each* particular case.[10] Whether the plaintiff's delay is unreasonable, or whether his conduct

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Necessary elements of acquiescence.

(5) *B* must have encouraged *A* in his outlay or acts, either directly or indirectly, or by not asserting his own right. (Willmott *v.* Barber, per Fry, J., 15 Ch. D., 96; Ramsden *v.* Dyson, L. R., 1 H. L., 129; Beauchamp *v.* Winn, L. R., 6 H. L., 223; Collet on Specific Relief, p. 354). But once an act is committed, without such knowledge or assent, a right of action has accrued, and no lapse of time short of the period of limitation will bar it, though it may be that delay viewed as *laches* may make the Court decline a particular form of relief." (De Bussche *v.* Alt., 8 Ch D., 286).

Commenting on cl. (*h*) of sec. 56, Act I of 1877, Mr. Collet, at pp. 350-352, points out that the defence of acquiescence is applicable only to the case of a *continuing* wrong or a *continuing* breach of contract, and not where each act, though the same in kind, is distinct and complete in itself.

As to knowledge, see Jehangir *v.* Shamji, 4 Bom., 185; Savaklal *v.* Ora, 8 Bom., 77; Dharamji *v.* Gurroo, 10 Bom., 311; Bhoobun *v.* Elliott, 6 B. L. R., 85; Juggobondhu *v.* Kurum, 22 W. R., 341; Langlois *v.* Rattray, 3 C. L. R., 1; and notes, p. 61, *supra*.

The weight due to a submission to an adverse title depends on the just belief that the parties whose interests are affected by acquiescence possess knowledge of their right, means to enforce it, and counsels how to set about resisting a step injurious to it, which are ordinarily in the possession or reach of either of two rival claimants. A presumption by acquiescence in a rival claim, from the *mere non-contestation for a limited time* of an adverse title, is not pressed against an *infant* or a Hindu *female*. Ramamani *v.* Kulâuthi, 14 Moo. I. A., 346; 17 W. R., 1. Where there is a *fiduciary* relation (as there is between an attorney and his client) acquiescence will not be lightly inferred from the *delay* of the *weaker* party in enforcing his right against the other. (See Monohor *v.* Romanath, I. L. R., 3 Calc., 473, 483, and notes, p. 61, *supra*).

Infants, females and trustees.

[9] Elliott *v.* Bhoobun, 19 W. R., 194, P. C.; Moran *v.* Mittu Bibee, I. L. R., 2 Calc., 58, 92. Knowledge may be *presumed* from the circumstances of the case. Possession of the property may raise a presumption of knowledge and acquiescence. Bright *v.* Walker, 1 C. M. and R., 217.

Laches. Plea and onus.

[10] See notes, p. 61. Laches in filing a bill in equity should be *pleaded*. (Cougreve *v.* Power, 1 Moll., 121). The *burden* of *proving* laches and acquiescence is on the party pleading the same. (*In re* Birch, 27 Ch. D., 622 at p. 629; Rajan *v.* Basuva, 2 Mad., 428).

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has been such as to induce the defendant to alter his condition, whether there is mere *laches* (which is often looked upon as an *inferior species of acquiescence*) or whether there is acquiescence *properly* so called, must be determined *differently* under different circumstances. The bar of the law of limitation, on the other hand, is stringently applied to all cases *alike*, whether or not there is actual *laches* or acquiescence. The plea of *laches* is, in this respect, more *equitable* than the objection of limitation, and the defence of acquiescence proper is not only equitable, but such as may be conscientiously and *righteously* urged in a Court of Justice. But the question of the morality of using the law of limitation as a defence is, under certain circumstances, susceptible of a different answer.

The three pleas compared. See also p. 66.

Referring to the statute of limitations passed in the 21st year of James I, Lord Mansfield said: "The debtor may either take advantage of the statute of limitations, if the debt be older than the time limited for bringing the action, or he may waive this advantage; and in *honesty* he ought not to defend himself by such a plea."[11] Speaking of the same statute, Mr. Justice Story, in 1828, observed,[1] that "it had been a matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that the statute, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, should have received such support as would have made it, what it was intended to be, emphatically a statute of repose." As no law can be (legally) unjust, it must be admitted that, from a purely *juridical* point of view, the plea of limitation is not, and cannot be, an unjust defence. But from an *ethical* point of view, it can hardly be denied that, if the defendant has no reason to doubt the (natural) justice of the claim made against him, and is able to satisfy it, he ought, in point of conscience, to do so. If, however, the defendant is dubious of the existence and justice of the claim, he may honestly and righteously plead limitation against it.[2] And where the plaintiff's delay and other circumstances have rendered it impossible

The morality of the plea of limitation.

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[11] Quantock *v.* England, 5 Burr. R., 2628. See Angell, sec. 210.

[1] Bell *v.* Morrison. See Angell, secs. 23 and 212; and Mangu *v.* Kandhai, I. L. R., 8 All., 475, at p. 482; Buswell, 529.

[2] Paley, Lord Holt, and Lord Kenyon were of opinion that the plea of the statute was by no means generally dishonorable, and Lord Cranworth held it might often be a righteous defence. (See Brown on Limitations, pp. 20—22). "There may not necessarily be any moral wrong in setting up the defence of lapse of time." (Maxwell on the Interpretation of Statutes, 348).

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for the defendant to discharge his obligation, he may, with a safe conscience, invoke the aid of the law.

Prescription—morality.

If a particular statute of limitation not only bars the remedy, but *extinguishes the claim itself*, the *plaintiff* cannot, after the expiry of the limited period, conscientiously assert a right which (by the public law to which all rights are subject) is no longer his; and the question of the defendant's honesty does not arise any more than where the law makes it *imperative* on the Courts to take up the question of limitation, whether raised by the defendant or not. And if the statute *transfers* the plaintiff's right to the defendant, he is no more bound in conscience to restore it to the plaintiff than a legal heir is bound to give up the inheritance to the next-of-kin, when in *natural* justice these latter appear to have a preferable claim.[a]

The plea of limitation, whether it must be set up by the defendant.

Reasons of public policy having dictated the enactment of the law of limitation, the Indian Legislature has, since 1871, expressly declared that, whether the defence of limitation be pleaded or not, the Courts, whether of first instance or of appeal, are bound to give effect to such law. (See sec. 4, Act IX of 1871, and sec. 4, Act XV of 1877, and the illustrations). The bar of limitation cannot be waived, and suits and other proceedings *must* be dismissed if brought after the prescribed periods of limitation.

Under the English law.

It cannot now be contended that the law of limitation is a law passed in ease, or for the benefit, of defendants, and that they may waive a law which is passed for their benefit. But, under English law, as well as under the Regulations and Act XIV of 1859, this question was not free from doubt.[b] It was first ruled that the Statute of James I, by its own force, operated as an absolute bar and without pleading it, but it is now settled law that the English statutes of limitations must be *pleaded* by the defendant at an early stage of the case if he wishes to avail himself of them, and that the Court will not *ex mero motu* raise the question of

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[a] But Vattel, who bases the law of limitation and prescription on the presumption of abandonment, says: "If the *bonâ fide* possessor should discover with perfect certainty that the claimant is the real proprietor, and has never abandoned his right, he is bound, in conscience and by the internal principles of justice, to make restitution of whatever accession of wealth he has derived from the property of the claimant" (Law of Nations, Ch. XI). The possessor is certainly so bound to restore the property during the *course* of prescription, but not after the expiry of the prescriptive period. This is the opinion of the most learned of the Canonists. See Brown, p. 21.

[b] This question is discussed in Payne *v.* Coustable (1 B. L. R., O. C., 60).

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limitation, even if it appears on the face of the declaration that the cause of action accrued out of the limited time.[5]

In consequence of the Statute of William IV *extinguishing* the *title* of the dispossessed owner of land, at the same time as his right of action is *barred*, it is unnecessary in any action for the recovery of *land* to *plead* the statute specially; the proper course in pleading is to traverse such owner's title. (*De Beauvoir* v. *Owen*, 5 Exch., 166).

Under the Regulations of Bengal and Madras.

The language of the Regulations (III of 1793 for Bengal, II of 1802 for Madras, and I of 1800 for Bombay) was much stronger than that of the Statute of James I. The Regulations *prohibited the Courts* of Adawlat from *trying* the merits of any suit, if the cause of action should have arisen twelve years before, unless the complainant could show by clear and positive proof that his case fell within one of the recognised exceptions. And in a case where it was urged that the plea of limitation not having been taken by the defendant on the pleadings, the lower Appellate Court was wrong in giving effect to it, their Lordships of the Privy Council observed that the positive language of the Regulation *affected the jurisdiction* of the Court, and rendered it incumbent on the plaintiff, in pleadings conducted with any degree of regularity, to show by proper allegations in his plaint either that the cause of action did accrue within twelve years, or to bring himself within the other alternative stated in the Regulations; and it was the duty of the Court to give judgment against him, when the cause came to a hearing, for defect of such allegations, unless that defect was supplied by the allegations in the pleadings of the opposite party.[6]

(Jurisdiction).

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[5] See Angell, sec. 285; Darby and Bosanquet, p. 427; and Banning, p. 8. In England the law of limitation comes under the category of those rules which exist for the benefit of parties, and which, like the plea of minority, may be waived by the person entitled to the benefit thereof. (Mangu *v.* Kandhai, I. L. R., 8 All., 475, at p. 484). It has been held in England that *laches* in filing a bill in equity should also be *pleaded*. (Cougreve *v.* Power, 1 Moll., 121). As to the *onus* of proof, see note 10, *supra*.

French law.

The provisions of the Code Napoleon differ from the Indian law and also from the English law. Under art. 2223 "*Judges* can *not* supply officially the argument resulting from prescription; and under art. 2224 "prescription may be objected in *every stage* of the cause even before the Court of Appeal," unless the objector can be presumed to have renounced it.

[6] Yachereddy Chinna *v.* Yachereddy Gowdepa, 5 W. R., P. C., 114, *per* Mr. Baron Parke.

Bombay Reg. V of 1827.

It should be here observed that the language of Bombay Reg. V of 1827 is not at all prohibitory. So far as it was a law of limitation it merely gave the *defendant* a privilege. The bar of limitation was to be considered "a sufficient *defence*."

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Under the Regulations of Bengal and Madras.

There is nothing in Bengal Reg. II of 1805 which affects the previous law in respect of the matter now under consideration.[7] That Regulation also *took away* from the Courts all *authority* to take cognizance of any suit whatever if the cause of action accrued sixty years before the institution of the suit.[8] And the provision by which the ordinary period of twelve years was extended to sixty years expressly required that the plaintiff should set forth distinctly in his plaint or application the grounds on which he claimed such indulgence.[9] Where certain proceedings before the Revenue Courts were not in the nature of a regular suit, their Lordships of the Privy Council applied the rule of limitation, although the plea had not been raised in the Courts below.[10] There being *no pleadings* in the case, the objection of the plaintiff that the defendant had not urged the bar of limitation was considered to be of a technical nature.

But in a regular suit in the ordinary Civil Courts for possession of submerged lands after their reappearance (where it was very doubtful upon the facts found whether the plea of limitation under Reg. III of 1793, if it had been raised by the defendant, could have prevailed) the Privy Council refused to entertain the plea, on the ground that it had not been taken by the defendant in the Court of first instance, and that the plaintiff had no opportunity of meeting it by evidence.[1] This case, however, cannot be supposed to lay down the broad and general rule that the Courts could not raise the question of limitation under the Regulations simply because the defendant had not set up the bar and the plaintiff had closed his case.[2] Such a supposition would be inconsistent with the observations of the Privy Council in other cases.[3]

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[7] *Per* Mr. Justice Markby in Payue *v.* Constable, 1 B. L. R., O. C., 49, at p. 53.

[8] Chandrabulle Dabee *v.* Lukhee Debi Chowdhurani, 5 W. R., P. C., 1.

[9] Kissen Chunder Ray *v.* Ramkanaye Dass, 2 Hay, 55.

[10] Maharaja of Burdwan *v.* The Government of Bengal, 4 Moore's I. A., 466. The principle of this decision is fully applicable to suits in the Courts of Small Causes, where there are no regular pleadings. See the judgment of Peacock, C. J., in Payne *v.* Constable, 1 B. L. R., O. C., 49, at p. 65.

[1] Mussamut Imam Bandi *v.* Hurgobinda Ghosh, 4 Moore's I. A., 403; (S. C.) 7 W. R., P. C., 67.

[2] See Mr. Justice Norman's judgment in Payne *v.* Constable, 1 B. L. R., O. C., 49, at p. 60.

Questions of jurisdiction.

[3] The observations of the Privy Council in Yachereddy Chinna's case have already been referred to. In Spooner *v.* Juddow (4 Moore's I. A., 353, 376) Lord Campbell says: "If the Court is *forbidden by law to try* the cause, neither the new rules, nor any *omission* of

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Result of the authorities.

It may be gathered from the decisions upon the Regulations of Bengal and Madras that, if the facts proved or admitted clearly brought the case within their provisions, the Courts were *bound* to give effect to them even if the defendant did not plead them.

Under Act XIV of 1859.

Act XIV of 1859 enacted that no suit should be maintained in any Court of Judicature, unless the same was instituted within the prescribed period of limitation. After a number of conflicting decisions on the subject, it was distinctly held in 1868 that the plea of limitation under this Act did *not* involve a question of *jurisdiction* in the *proper* sense of the word.[4] But whether the defendant pleaded the law of limitation or not, if it appeared upon the facts admitted or proved that the suit was barred by the law, the Court of first instance was nevertheless bound (indepedently of the provisions of the Civil Procedure Code) to hold that the suit should not be maintained unless it fell within one of the exceptions.[5] Act VIII of 1859, the Code of Civil Procedure, expressly required the plaintiff to state the time when his cause of action arose, and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, to state the ground upon which exemption from the law was claimed. (See sec. 26 of Act VIII of 1859, and the corresponding sec. 50 of Acts X of 1877 and XIV of 1882). The Code further made it the duty of the Court to reject the plaint if, upon the face of it, or after questioning the plaintiff, the right of action appeared to be barred by lapse of time. (See sec. 32, Act VIII of 1859, and the corresponding sec. 54, Acts X of 1877 and XIV of 1882). The written statements of defendants were required to be confined as much as possible to a simple narrative of the *facts* which were believed to be material to the case. (See sec. 123, Act VIII of 1859, and the corresponding sec. 114 of Acts X of 1877 and XIV of 1882). The

Not a question of jurisdiction.

Under the Code of Civil Procedure.

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the defendant, would give the Court jurisdiction over it. The *facts* ousting the jurisdiction having been brought judicially to the *notice* of the Judge, and with perfect regularity, he usurps a jurisdiction which does not belong to him if he proceeds and gives judgment for the plaintiff; therefore, on these facts coming out for the first time on the trial of an issue, though they may seem irrelevant to that issue, he must have power by directing a nonsuit or by some other means to stop the trial." In these cases the question was one of *jurisdiction* in the *strict* sense of the term.

[4] Payne *v.* Constable, 1 B. L. R., O. C., 49. It is the same under the later Acts also. See Mahomed Hossain *v.* Purundur Mahto, I. L. R., 11 Calc., 287, at p. 292.

[5] See the judgments of Peacock, C. J., and Norman, J., in Payne *v.* Constable. Mr. Justice Markby was of a different opinion. This was a Small Cause Court case to which the Code of Civil Procedure did not apply.

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General rule.

objection that the defendant had not specifically pleaded the law of limitation could not therefore be maintained when it appeared upon the facts that the suit was barred by the law. But if this did not appear to the Court on the face of the plaint, or after examining the plaintiff, there was no *express* provision in the Procedure Code to show that the Court of first instance or other Courts on appeal were *bound, ex mero motu*, without plea, to raise the question of limitation.[6]

It would appear that, speaking generally, the plea of limitation under Act XIV of 1859 was allowed to be taken up for the first time even in special appeal, provided the facts which raised the plea were admitted or found, and no further investigation was necessary to ascertain them.[7] This general rule was not observed if a previous final, though erroneous,

Exceptions to the general rule.

proceeding between the parties precluded the Court from applying, or estopped the defendant from taking advantage of, the Act. Thus, where the judgment in a previous suit for partition between *A* on the one hand, and *A's* father and brother on the other, erroneously determined that, under the Mitakshara, *A* was not entitled to sue until after his father's death, and *A's* brother (the defendant) had for years enjoyed the benefit of that judgment, it was held by the Privy Council

Estoppel.

that *A's* brother was estopped by that judgment from setting up the bar of limitation (under cl. 13, sec 1, Act XIV of 1859) to a fresh suit for partition instituted by *A after* the father's death.[8]

Again, where a case was (on special appeal) remanded to the lower Court for the trial of a *particular issue* on the

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[6] See Moru bin *v.* Gopal bin, I. L. R., 2 Bom., A. C., 120. Sec. 4 of the Limitation Acts of 1871 and 1877 makes it imperative on the Courts to dismiss a suit or other proceeding instituted after the prescribed period, although limitation has not been set up as a defence.

[7] See Narsu *v.* Krisna, 1 Mad., 358; Ramnath *v.* Vaithalinga, 2 Mad., 238; Saluji *v.* Rajasangi, 2 Bom., 162; Davlata bin *v.* Biru bin, 4 Bom., A. C., 197; Ram Dhan *v.* Ram Ruttan, 10 W. R, 425.

But Kemp and Glover, JJ., in Ray Dinkur *v.* Sheo Golam (12 W. R., 215), held that a plea of limitation (not involving a question

Sec. 350 of Act 8 of 1859.

of jurisdiction) could not, under sec. 350, Act VIII of 1859, be taken for the first time, in special appeal. And Westropp, C. J., in Moru bin *v.* Gopal bin (I. L. R., 2 Bom, 120) doubted the correctness of the rulings in 2 Bom., 162, and 4 Bom., 197. As for sec. 350, Act VIII of 1859 (corresponding to sec. 578 of Acts X of 1877 and XIV of 1882), it may be observed that, if that section applied, no decision of a lower Court on any question of limitation could be reversed by the High Court in appeal, regular or special. An error in the decision on a question of limitation *does* affect the *merits* of the case within the meaning of that section. See note 9, *infra*.

[8] Lakshman Dada *v.* Ram Chunder Dada, 7 C. L. R., P. C., 320; S. C., I. L. R., 5 Bom., 48. It should be observed that the effect of sec. 4, of Acts IX and XV, had not to be considered in this case.

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merits, it was held by four Judges of the Bombay High Court that the plea of limitation, even if apparent on the face of the record, could not be raised for the *first* time in a second special appeal from the judgment of the lower Court after the remand.[9] The remand order of the High Court, in this case, was treated as an indirect but *final determination*, that the suit was not barred by limitation.

Remand order finally deciding question of limitation.

But where the question of limitation was raised in the Court of first instance and decided in favor of the plaintiff, and the Appellate Court, *without passing any judgment* on the question of limitation, remanded the case for *further investigation*, it was competent to the Appellate Court, when the whole case came before it ultimately in appeal, to try the question of limitation.[10]

Under Acts IX and XV.

And now, Illustration (*a*) of sec. 4, Acts IX of 1871 and XV of 1877, makes it the *duty* of the *Court*, whether Original or Appellate, to dismiss suits and other proceedings if they appear to be barred by limitation, whether limitation is pleaded by the defendant or not, and it would

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[9] Moru bin *v.* Gopal bin, I. L. R., 2 Bom., 120. See also Dattu *v.* Kasai, I. L. R., 8 Bom., 535; and Moonshee Buzl Rahim *v.* Sreenath Bose, 6 W. R., 178. In Raisingji *v.* Balvantrao, I. L. R., 11 Bom., 663, the first Court decided the suit on the grounds (1) that it was *res judicata*; (2) that it was barred by limitation. The Court of first appeal upheld the decree on the first ground *without passing any judgment* on the point of limitation. On second appeal, the decision on the question of *res judicata* was reversed, and the case remanded for *trial on the merits*. This remand order, it was held, left open the whole case including the question of limitation. An Appellate Court's order overruling the plea of "no jurisdiction," and remanding the case for *trial on the merits* does not prevent the lower Court from trying the issue of limitation. See Rajah Tejkishen *v.* Shib Chunder, 3 W. R., Act X, Rulings, 158.

[10] Niljaree *v.* Mojubullah, 19 W. R., 209.

In Musst. Phool Kumari *v.* Woonkar Persad, 7 W. R., 67, Peacock, C. J., observed that the remand order in that case was *not intended to exclude* the defendant from a further finding on the issue of limitation upon the facts as they should appear upon the *new trial* ordered by the Appellate Court.

Appeal—mediate and immediate—from remand orders.

In Mirza Himmut Bahadur *v.* Govinda Panday (5 W. R., 91, F. B.) it was held that submission to an order of the lower Appellate Court overruling the plea of limitation and remanding the case for a trial on the merits, does not preclude the defendant from pressing the objection of limitation in special appeal from the *final decree* of such lower Court. If an appeal to the High Court is preferred (under cl. 28, sec. 588 of Act XIV of 1882) *immediately* after such an *order* of remand, and even if the court-fee paid on the memorandum of appeal is Rupees two only, the High Court may not only consider whether the order of remand satisfies the requirements of sec. 562 of Act XIV of 1882, but may also determine the correctness of the lower Appellate Court's decision on the question of limitation on which the Court of first instance disposed of the whole case. (Bhau Bala *v.* Bapaji, I. L. R., 14 Bom., 14, F. B.)

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Where judgment is *confessed*.

seem even when defendant confesses judgment.[1] But if, in a suit or other proceeding which is really barred by limitation, an order is made by a Court having competent jurisdiction to determine the question of limitation, and such order overruling or ignoring the objection, directly or indirectly *determines* that the suit or proceeding is *not* barred, the order, unless reversed upon appeal, is valid and binding. And the Court which passed this *final* order, or even a higher Court, cannot in a subsequent stage of the

The effect of a previous *final* decision.

same case (*e.g.*, in *execution* of the decree in the suit or in a *second* or *later* application in the matter of an execution proceeding) dismiss the suit or proceeding, although such order was erroneous in point of law.[2] Remanding a case, on appeal, for the trial of a *special* issue on the merits is indirectly or constructively determining that the suit is not barred by limitation.[3] Ordering the attachment of the debtor's property in execution of a decree is constructively determining that the application for execution is not barred by the statute.[3] And if the order of remand or attachment becomes *final* by reason of no appeal having been preferred against it, notwithstanding the discovery at a later stage of the case that the suit or application is barred by limitation, it is not competent to that Court, or even an Appellate Court, to dismiss it on that ground.[4]

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[1] See the ruling of the Punjab Chief Court in Jaimal Singh *v.* Bhaga, cited in Rivaz on Act XV of 1877, p. 15. See also Deb Narain *v.* Ishan, 13 C. L. R., 153, 155. In Bhawani *v.* Bisheshwar, I. L. R., 3 All., 846, 848, the question of limitation was taken up by the Allahabad High Court, although it had been *abandoned* in the lower Courts.

Plea *abandoned*.

[2] Mungal Persad *v.* Grijakant, I. L. R., 8 Calc., 51 ; S. C., 11 C. L. R., P. C., 113. Bandy Karim *v.* Romesh Chunder, I. L. R., 9 Calc., 65.

[3] Moru bin *v.* Gopal bin, I. L. R., 2 Bom., 120, 131.

Sec. 4, Acts IX of 1871 and XV of 1877 would not, it is submitted, alter the rule laid down in these cases. (See Dattu *v.* Kasai, I. L. R., 8 Bom., 535). But, in Ambala *v.* Naduvakat, I. L. R., 6 Mad., 325, a

Even where defendant is *estopped* (?)

Division Bench of the Madras High Court was of opinion that the *Court* was *bound* to consider the question of limitation, even where it was not open to the *defendants* to take this objection *of themselves*. The facts of the case, however, show that the defendants were *not* precluded by any *final decree* of the lower Appellate Court from pressing their objection of limitation.

A remand for a trial on the merits at *large*, should be distinguished from a remand for the trial of a *particular* issue on the merits, I. L. R., 2 Bom., at pp. 130 and 132.

[4] Where the Judge or Subordinate Judge remands a case for trial on the merits, the remand order does not become final until 90 days have elapsed from the date of the *final decision* of the case by the Judge or Sub-Judge. See Mirza Himmut Bahadur *v.* Govinda Panday, 5 W. R., 91, F. B. But cf. Ambala Raman *v.* Naduvakat Krishna, I. L. R., 6 Mad., 325.

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When the appellate Court *cannot* enter into the question of limitation.

Again, where a suit for the recovery of a principal sum with interest, though barred by limitation, is erroneously decreed for the plaintiff, and the defendant appeals only as to the interest ordered to be paid, the decree as regards the principal having become *final*, and the *whole* case not being before the Appellate Court, the suit cannot be dismissed *in toto*, on the ground that it is barred by limitation. The Appellate Court has no right to enter into the question of limitation affecting that part of the decree which is not properly before it.[5] So, if some of the defendants appeal against a decree obtained by the plaintiff in a suit which is barred by the statute, and the provisions[6] of sec. 544 of the Civil Procedure Code of 1877, or of 1882, do not apply, the Appellate Court cannot, on the ground of limitation, reverse such decree in favor of the other defendants who have allowed the decree to become *final* as against them.

Estoppel.

But since Act IX of 1871 came into operation, a legally erroneous decision in one case between *A* and *B*, that *A's* cause of action has not yet arisen, will not, probably, prevent the Court in a *second* case between the same parties from holding that the suit is barred by limitation, though it would not be barred if the decision in the first case were correct. The defendant may or may not be estopped[7] by the decision in the first case from setting up the statute, but the Court, it is apprehended, will not be precluded by it from applying the law to the second case.

The plea of limitation in Courts of 1st appeal and of 2nd appeal.

A Court of Regular Appeal may or may not allow *new* evidence[8] to be taken on the question of limitation, but if it finds the necessary facts, it is bound to dismiss the suit as barred, except, perhaps, where it is clearly precluded from doing so by some other imperative rule of law applicable to the particular circumstances of the case. These remarks apply also to second or special appeals, provided the facts on which the question of limitation depends are

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[5] Alimunnissa *v.* Syed Hossein, 6 C. L. R., 267; Raghunath *v.* Paresbram, I. L. R., 9 Calc., 635.

[6] Where *some* of the defendants have appealed against the *whole* decree, an Appellate Court is allowed to reverse or modify the decree in favor of *all* the defendants, provided the decree proceeds on any ground *common* to all of them. Sec. 544, C. P. Code.

[7] See note 3, *supra*, and compare Lakshman Dada *v.* Ram Chunder Dada, I. L. R., 5 Bom., 48, P. C. See p. 80, *supra*. In Parthasaradi *v.* Chinna, I. L. R., 5 Mad., 304, it is pointed out that the doctrine of "estoppel by verdict" is not applicable to the determination of an issue of law. This is so, if the question of law is raised in a suit upon a *different subject-matter*. (Bigelow, 4th Ed., 95).

[8] See Morasu *v.* Krisna, 1 Mad., 358; also 3 Mad., 258.

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Where necessary facts *not* found by lower Court.

admitted or found by the lower Court. A Division Bench of the Allahabad High Court has gone further, and in a recent case in which the plea of limitation, although abandoned in the lower Appellate Court, was urged in second appeal, Straight and Duthoit, JJ., said: "We must of necessity notice it, now that it is pressed here," and they remanded the case *for a finding of fact*[9] which they considered necessary for determining the question of limitation. (*Bhawani* v. *Bhisheswar*, I. L. R., 3 All., 846).

Fair and proper to urge the plea early.

Notwithstanding the provisions of sec. 4 of the Limitation Act, it is but fair and proper that the preliminary objection of limitation, if not discovered by the Court at the first stage of the suit, should be taken by the defendant at the earliest opportunity afterwards, in order to prevent the waste of time and money which a different course would entail.[10]

Prescription *need* not be pleaded.

As to *prescription*, it may be observed that it is not necessary for the *defendant* to plead specially that the plaintiff's title has been extinguished by the statute; the proper course in pleading is to traverse the owner's title.[1]

Limitation may be pleaded even where the right is denied.

A plea of limitation is not necessarily a mere plea of confession and avoidance. A defendant who does not admit the plaintiff's right, may plead limitation as an *alternative* ground of defence.[2] The defendant may say that the plaintiff has no right to the thing claimed by him, and that even if he had any right, he is barred by limitation. In a suit for possession, if the defendant denies the plaintiff's right to possession, but fails to prove his own allegation of a right to remain in possession as tenant of the plaintiff, he may nevertheless avail himself of the plea

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Questions of *jurisdiction*, depending on facts not found.

[9] But it may be here remarked that even questions of *jurisdiction*, when depending upon questions of fact, cannot be taken up for the first time in special appeal (*per* Garth, C. J., in the Court of Wards *v.* Rupmanjari, 25 W. R., 260; and Peacock, C. J., in Lutifoonessa *v.* Baboo Pulin, W. R., Sp. No., p. 31, F. B.; see also 5 W. R., P. C., 31, Bhai Chand *v.* Pertab). And that no question or objection should be permitted to be raised or taken in Special Appeal, which, if raised in the lower Courts, might have been met in those Courts by adopting a course which cannot be adopted in Special Appeal (*per* Couch, C. J., in Shib *v.* Nursing, 22 W. R., 352).

[10] Moru bin *v.* Gopal bin, I. L. R., 2 Bom., 120, at p. 131.

[1] De Beauvoir *v.* Owen, 5 Exch., 166; see Darby and Bosanquet, p. 389, and p. 77, *supra*. The language of the English law (3 & 4 Will. IV, cap. 27, sec. 34) in this matter is similar to the language of sec. 29, Act IX of 1871, and sec. 28 of Act XV of 1877. As to whether the *plaintiff* should plead prescriptive title, see Lecture XI.

[2] See Sootee Misser's case, 16th September 1863, 2 Sevestre, p. 249.

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of limitation on the ground of his actual possession as a trespasser.[3]

Under what circumstances, if any, a tenant, a trustee, a mortgagee, a servant or an agent may rely on the defence of limitation in a suit for possession by the landlord, the *cestui que trust*, the mortgagor or the master will be considered elsewhere.[4]

Where two plaintiffs sue upon a *joint* cause of action, and the defendant pleads limitation, if one of the plaintiffs is barred by limitation, the other cannot recover upon a *separate* cause of action, if any accrued to him at all. In order to succeed in the suit as brought, it must be proved that the joint cause of action is not barred.[5]

Limitation against a joint cause of action.

The provisions of the Limitation Acts do not in terms apply to defendants, so that a defendant may set up a right by way of *defence* which he would be precluded by limitation from setting up as a plaintiff by way of *substantive claim*.[6] In other words, lapse of time, where it does *not extinguish* the original right, is, generally speaking, no bar to a plea or defence based on such right.[7] But a plea of set-off, though not within the Statute of James I, is in England held to be within the equity of the statute, and where such a plea is made, plaintiff can

Limitation as against a defendant.

Where the defendant pleads a set-off.

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[3] Dinomonee Debee *v.* Doorgapersad, 21 W. R., 70, F. B. ; Maidin *v.* Nagapa, I. L. R., 7 Bom., 96. Compare Doyal Jairas *v.* Khatav, 12 Bom., 97, where it was held that a defendant having by his written statement pleaded that if a *general* partnership account were taken, he would be found not to be indebted to the plaintiff in respect of the contribution claimed by the plaintiff, cannot also plead the Limitation Act as a bar to the taking of *such* account. Here the plaintiff's primary claim for contribution (to an undoubted payment on account of a joint decree) was not barred by limitation, and was maintainable, although his right to a *general* partnership *account* might have been so barred. It was the defendant who urged that if a general account were taken, it would appear that he ought not to be called on to make any further contribution, and it was he who, when the account was taken, objected that the taking of such account was barred by limitation.

Defendant, not allowed to plead limitation to matter of *defence*.

[4] See Lecture VI. See also Shaikh Nujmuddin *v.* Mr. Lloyd, 15 W. R., 232 ; and Madhub Chunder Giree Petitioner's Case, I. L. R., 3 Calc., 243. See section 10, Acts IX of 1871 and XV of 1877.

[5] Rajaram *v.* Luchman Persad, 8 W. R., 15, 21-22, F. B.

See also Ram Comal *v.* Nund Ram, 10 W. R., 262, where it was held that in a joint claim for possession, plaintiffs must establish a joint enjoyment of the property within the period of limitation. As to suits by joint contractees, see Ram Sebuk *v.* Ramlal, I. L. R., 6 Calc., 815 ; 8 C. L. R., 457 ; and Kalidas *v.* Nathu, I. L. R., 7 Bom., 221. If one is barred, all the others are in effect barred.

Joint contractees.

[6] Ram Narain *v.* Poolin Behari, 2 C. L. R., 5. Speaking generally, the *plaintiff* cannot seek to apply the law of limitation against the defendant. Lala Prabhu *v.* Milne, I. L. R., 14 Calc., 401, at p. 417.

[7] Lindley's Thibaut, p. 184, and Appendix, p. cxv. See p. 88, *infra*.

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Pleading a set-off.

take advantage of limitation in the same manner as a defendant. In this country, the provisions of sec. 111 of Act X of 1877 and of Act XIV of 1882 expressly require that the sum which the defendant claims to set off against the plaintiff's demand must be *legally recoverable*. And as a debt barred by limitation is not legally recoverable, it cannot be set off against the plaintiff's demand. A set-off is available as a *simultaneous* cross-action would be. If it is to be barred at all, it must be barred at the time of the *commencement* of the action. Limitation will be reckoned from the accrual of the cause of set-off to the date of the institution of the plaintiff's suit, and not to that of claiming the set-off.*

Presumption against defendant.

In some cases the defendant may be prevented by the doctrine of *presumption* from availing himself of a ground of *defence*, which but for the law of limitation he might have made a ground of action. Long delay in asserting the right to abatement of rent may induce the Court, in a suit for arrears of rent, to make a conclusive presumption against the defendant's plea.* And though limitation does not apply to a *defendant*, the question may arise whether or not he is bound by a summary award or order which becomes final by reason of its not being contested within the time allowed by law. If the award or order becomes, by lapse of time, conclusive as to the *right* of the parties, even a plaintiff may derive advantage from such lapse of time.**

Where the defendant is bound by a summary order.

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* Banning, p. 31 ; Walker *v.* Clement, 15 Q. B., 1046, followed in Pragilal *v.* Maxwell, I. L. R., 7 All., 284. See also Lovell *v.* Forester, L. R. (1890), Weekly Notes, 64. But see a dictum of Tottenham, J., in Bhagbat *v.* Bamdeb, I. L. R., 11 Calc., 557, at p. 561.

* Ram Narain *v.* Poolin Behary, 2 C. L. R., 5. See p. 66, *supra*.

Orders under sec. 246, Act VIII of 1859.

** Badri Prosad *v.* Mohammed, I. L. R., 1 All., 381, F. B. In this case the defendant had not sued to establish his right after an order refusing to release his property from attachment, under sec. 246, Act VIII of 1859 (corresponding to sec. 283 of Act X of 1877 and of Act XIV of 1882). After the time prescribed by law for such a suit, the plaintiff who had purchased the attached property in execution was allowed to recover it from the defendant, on the ground that the latter was precluded from asserting his right. See also Babu Hit Narain *v.* Paltoo, 1 Shome's L. R., 173 ; Velayuthan *v.* Laksmana, I. L. R., 8 Mad., 506 ; Krishnaji *v.* Bhaskar, I. L. R., 4 Bom., 611 ; Khublal *v.* Ramlochun, I. L. R., 17 Calc., 260 ; Yeshvant *v.* Vithoba, I. L. R., 12 Bom., 231 ; Bapu *v.* Baji, I. L. R., 14 Bom., 372, at p. 376 ; Achuta *v.* Mammavu, I L. R., 10 Mad., 357. But so long as the prescribed time does not expire, the summary order itself cannot create any estoppel. (Per Garth, C. J., in Gend Lall *v.* Denonath, I. L. R., 11 Calc., 673).

Possessory Revenue awards.

In the following cases of *possessory* awards not contested by the defendant within time, the plaintiff's contention that the *defendant* was barred was *not allowed*. As to such awards by Revenue Officers, see Shunkur *v.* Raja Ram, 4 W. R., 56 ; and Mohima Chunder *v.*

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Prescription may be pleaded against a defendant as well as against a plaintiff.

Whether the plaintiff acquires a title by positive prescription, or whether the defendant's right is extinguished by extinctive prescription, the law of *prescription* may, of course, be pleaded against the defendant. Suits to *recover* property comprised in certain possessory awards or orders of the Revenue or Criminal Courts (Nos. 45 and 46 of Act IX, and Nos. 46 and 47 of Act XV) are, it is apprehended, within the purview of sec. 29, Act IX of 1871, and sec. 28, Act XV of 1877; and, if so, a plaintiff, who had been in possession for three years under such an award or order, suing the other party for possession will now be allowed to contend that the defendant's right to the property has been extinguished by the lapse of three years from the date of the award or order. But if the defendant recovered the possession of the property *within* the three years, or continued to be in possession for the three years, though he did not sue to set aside the award or order, the plaintiff suing for possession cannot benefit by the fact that three years have elapsed since the date of the award or order. (See *Mohima* v. *Rajcoomar*, 10 W. R., 22).

Limited interests.

A party who cannot, by reason of his own admissions, plead prescriptive title in regard to *general or full* ownership, may rely on it in regard to the *limited or subsidiary* interest claimed by him. Adverse possession of a limited interest in immoveable property is a good plea to a suit for ejectment to the extent of that interest. (*Madhava* v. *Naryan*, I. L. R., 9 Mad., 244, at p. 247). See Lect. VI.

Promise not to plead limitation.

A promise by the defendant that he shall not raise the plea of limitation to the plaintiff's claim frustrates the policy of the law, and is, therefore, standing alone, of no avail to bar the operation of the statute. The defendant notwithstanding the promise is entitled to judgment if the suit on the original claim is brought after the time allowed by law.[1] A breach of a promise not to take advantage of the

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Possessory magisterial awards.

Rajkumar, 10 W. R., 22. As to awards under Act IV of 1840 (=sec. 530, Act X of 1872=sec. 145, Act X of 1882), see Joogul Kishore *v.* Rajkishen, 3 W. R., 129; and Wise *v.* Ameeroonessa, 6 C. L. R., 249, P. C. But it should be remarked that none of these cases was decided under Act IX of 1871 or XV of 1877, which expressly *extinguishes the right* in some cases. See Lecture XI.

Different rule as to *laches*.

[1] See pp. 34, 35, *supra*; and E. I. Co. *v.* Odit Churn Paul, 5 Moo. I. A., 44; Banning on Limitation, p. 52; and Darby and Bosanquet, p. 56. The rule as to the plea of *laches* is different. Where the defendant wrote that should his premises at any time become a nuisance, he was willing to assume that the plaintiffs were not damaged in their rights by delay,—it was held that the defendants could not set up the *laches* of the plaintiff. Baxter *v.* Bower (10 W. N., 11), cited in Gale on Easements, 5th Ed., p. 711.

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statute, if made for a good consideration, would only entitle the plaintiff to bring a separate action for damages. And if the promise is made *before* the expiry of the period of limitation, the plaintiff's forbearance to sue would of itself be a good consideration.[2] Mr. Justice Shephard, in his work on Limitation, points out that as the defendant cannot, since Act IX of 1871 came into operation, waive the plea of limitation, an agreement not to take advantage of the law of limitation is void in British India.

Promise not to sue.

As to a *plaintiff's* promise not to *sue*, see note, p. 64, *supra*.

Effect of agreements in some cases.

An agreement between the parties, reserving and keeping open as between them questions relating to a claim which might arise out of the *result* of a pending suit, may, in certain cases, have the effect of preventing the operation of the statute. See Syud Lutf Ali Khan *v.* Afzulunissa, 16 W. R., P. C., 20. In this case the plaintiff sued his co-sharer for money had and received by him for the plaintiff's use. In plaintiff's previous suit (which was against a debtor of the co-sharers) it was necessary to decide whether a certain sum of money had been paid by the debtor to this defendant for himself *only*, or for the plaintiff *as well*, and it was decided that the payment (so far as the debtor was concerned) was a payment in respect of the joint dues of the plaintiff and the defendant. Until the decision of that suit it could not (as between plaintiff and defendant) be said that the defendant had received any money for the plaintiff's use. At the date of the agreement the plaintiff and the defendant had *both* treated the debtor's payment as a payment on account of the *defendant's* share only.

[2] E. I. Co. *v.* Odit Churn, 5 Moo. I. A., 44; and Darby and Bosanquet, p. 57.

ADDENDA.

As a rule, limitation is not applicable to matter of *defence* (p. 85, *supra*).

The defendant cannot *waive* the plea of limitation *against the plaintiff*. And the plaintiff cannot (as a rule) *set up* the law of limitation *against the defendant*. Limitation is not applicable to matter of *defence*. The defendant's right to raise the plea that the deed under which the plaintiff claims was executed in fraud of the grantor's creditors, or that it was obtained from the defendant by fraud and misrepresentation, cannot be barred by the law of limitation. (See Wilhite *v.* Hamrick, 92 Ind., 594; Buswell, p. 534. See also Hargovandas *v.* Bajibhai, I. L. R., 14 Bom., 222). *But compare* Jugoldas *v.* Ambashankar, I. L. R., 12 Bom., 501.

The defendant's right to raise the *plea*, that he has a right of pre-emption over the land sued to be recovered by a purchaser of the owner's rights, cannot be barred by limitation. (See notes to art. 10, Act XV, and Kanharan Kutti *v.* Uthotti, I. L. R., 13 Mad., 490). See pp. 85, 86, *supra*.

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LECTURE V.

TRIAL OF THE ISSUE OF LIMITATION, AND THE BURDEN OF PROOF.

Ordinarily, issue of limitation tried separately from, and before, the merits—When questions of *limitation* and questions about the *merits* must be tried together—Sec. 14, Beng. Reg. III of 1793, prohibited the trial of the merits of suits barred by limitation—Practice before and after 1859—The *onus* as to the issue of limitation is on the plaintiff—Rule as to the *quantum* of evidence required—When the *onus* is shifted—*Onus* in suits for recovery of possession—What the plaintiff is required to prove in ejectment—Where the land in suit is *beel-bharati*—Where it is a *khal* or *khal-bharati* land—In the case of waste or *jungle* lands—Suits by reversioners, &c.—Suits under art. 144, Act XV—The two Privy Council rulings considered by the High Courts of Calcutta, Bombay, Madras, and Allahabad—Where evidence of acts of ownership is forthcoming, and where it is not—Where possession under a title is proved, but not within the prescribed period—The opinions of Wilson and Field, JJ., on the question of *onus*—English authorities on the question of *onus*—Wrongful possession of land under a claim of right before diluvion—The Calcutta F. B. ruling on the question of *onus*—Where the land is incapable of actual enjoyment in any of the usual modes—*Onus* as to the date of a change in the condition of such land—Possession within twelve years need not be proved in suits under art. 144, Act XV—Proof of determination of particular estates—Of possession having been permissive—Of disability and fraud—When *onus* is shifted in pre-emption suits—*Onus* under arts. 133 & 134 of Act XV—Proof of exceptional circumstances.

Issue of limitation ordinarily tried separately from, and before the merits.

THE *ordinary* rule is, that the issue of limitation should be tried separately, and that, before the bar is removed, the plaintiff is not entitled to go into the merits of his claim.[1] But there is no law which says that the issue of limitation must invariably and in every case be tried at a particular stage of the trial. Those issues or such of them as would be sufficient for the right determination of the case, must be determined in the most rational order which the circumstances of each particular case will permit.[2]

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[1] See pp. 91-92, *infra*. In a suit for possession of immoveable property, when the plaintiff while in possession of the property has been *dispossessed*, the issue of limitation is (ordinarily) the *first* to be considered, and it is wholly independent of the question of right or title. See Moharajah Koowar Singh *v.* Nund Lall Singh, 8 Moore's I. A., 199; 1 W. R., P. C., 51. See also Mohima Chunder *v.* Mohesh Chunder, I. L. R., 16 Calc., 473, at pp. 477, 481, P. C. Limitation, first.

[2] See the referring order of Mr. Justice Mitter in Denomoney *v.* Doorga Persad, 21 W. R., 70, F. B. Under Act XIV of 1859 in Runjeet Ram *v.* Goburdhun, 20 W. R., 25, under Act IX of 1871 in Radha Gobind Title, first.

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When *limitation* and *merits* must be tried *together*.

There may be cases in which it will be necessary to investigate all the facts before the law of limitation can be applied to the claim. In such cases the plea in bar may be tried in conjunction with the merits of the case.[3] In a suit brought to recover property from the hands of an alleged trustee, the defendant may deny the trust, and at the same time plead limitation. Here the Court must first determine that the case is not a case of trust at all before it determines the issue of limitation.[3a] And in a suit by a person excluded from joint family property to enforce a right to share therein, it would be necessary to determine whether the property in suit is joint family property before the provision of No. 127, Sched. II of the Limitation Act of 1877 could be applied to it. The plaintiff must, at the very outset of his case, show that he is a person excluded from joint family property in which he has a right to share.[4]

Possession and title together.

And although it is *generally* proper to deal with the question of possession for purposes of limitation, as distinct from the question of title, in some cases, as for instance where the right to land which is unfit for actual enjoyment in the usual modes (*e.g.*, swampy, waste or jungle land) is disputed, it is often impossible to give evidence of acts of ownership or possession over the property, because it is uninhabited and uncultivated, and no acts of ownership by any one have been exercised over it. In such cases it is often necessary to try the question of title in conjunction with the question of limitation. In the doubt created by the *absence of proof* of possession by *either* party, the Courts are obliged to resort to evidence of title, and to presume that the party

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v. Inglis, 7 C. L. R., 364, and under Act XV of 1887 in Rajkumar *v.* Gobind Chunder, I. L. R., 19 Calc., 660, 670, their Lordships of the Privy Council decided the question of title first. In Kalidas *v.* Kanhya Lall, I. L. R., 11 Calc., 121, 130, P. C., also, the question of title was decided first ; but this was *not* a suit for possession as upon a *dispossession*. See note 1, *supra*.

Limitation and title *mixed up*.

[3] See Mahammed Azim *v.* Sumeerooddin, 12 W. R., 286 ; Doorgaram *v.* Ratan Monee, 4 W. R., 61 ; Ambica *v.* Woodin, 3 W. R., 226 ; Rajab Saheb Perhlad *v.* Doorga Persad, 12 W. R., P. C., 14, in which the question of limitation could not be decided before deciding the question of the validity of the *mokurarree* pottah set up by the defendant. See also Rajkumar *v.* Gobind Chunder, I. L. R., 19 Calc., 660, at p. 669, P. C., where in a suit for possession as upon a dispossession of some swampy *beel-bharati* lands, it was held that the Judge's finding on the question of possession was quite properly *mixed up* with the finding on the question of title.

[3a] Denomoney *v.* Doorga Persad, 21 W. R., 70, at p. 71.

[4] See Indernarain's case, reported in the *Englishman* of the 6th August 1875 ; Kalikishore *v.* Dhununjoy Roy, I. L. R., 3 Calc., 228 ; Obhoy *v.* Gobind, I. L. R., 9 Calc., 237. In this respect there is no difference between Act IX of 1871 and Act XV of 1877.

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who has the title has also the possession.[5] And even in the case of cultivated lands, if there is strong evidence of possession on the part of the plaintiff, opposed by evidence apparently strong also on the part of the defendant, the Courts are, *sometimes*, obliged to try the question of title first, in order that they may decide the question of limitation, with the aid of the ordinary presumption that possession accompanies title.[6]

Where title and possession tried *together*.

Where it was admitted that plaintiff had a share with defendant in a certain *mehal*, and the question was, whether the lands in dispute belonged to that *mehal*, or to defendant's separate *mehal*, the plea of limitation was held to have been correctly tried with the merits of the case. The defendant having admitted that the plaintiff was in possession of the whole of his share of the joint mehal, the suit could not be barred by limitation if the disputed lands formed a part of that mehal, while, if they did not, the defendant would be entitled to judgment on the merits.[7]

But, *generally* speaking, in suits for ejectment based on boundary disputes, where plaintiff admits that he has been dispossessed, the issue of limitation is the first to be considered, and it is wholly independent of the boundary question. No proof of anterior title such as would be involved in the decision of the boundary question in plaintiff's favor, can relieve him from the burthen of removing the bar of limitation by proof that the cause of action accrued to him on a dispossession within twelve years next before the commencement of the suit.[8]

General rule.

Bengal Reg. III of 1793, sec. 14, and the corresponding enactments of the other Presidencies, prohibited the Courts

Sec. 14, Beng. Reg. III of 1793, prohibited the trial of the merits of a suit barred by limitation.

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[5] Mohima Chunder *v.* Hurro Lal, I. L. R., 3 Calc., 768; Ram *v.* Kusu, 5 C. L. R., 481. As to the presumption of *continuance* of rightful *possession*, see I. L. R., 9 Calc., pp. 754-5; I. L. R., 19 Calc., pp. 669, 674, P. C.

[6] Runjeet Ram *v.* Goburdhun, 20 W. R., 25, 30, P. C.

[7] Doorga Ram *v.* Ratanmonee, 4 W. R., 61. A similar reason is given in Rajah Saheb Perhlad *v.* Doorgapershad, 12 W. R., P. C., 14, in which a zemindar sued for possession by setting aside an alleged *mokurarree*. See note (3), *ante*.

[8] See Beng. Reg. III, and Maharaja Koonwar *v.* Nundo Lal, 1 W. R., P. C., 51. A similar case decided under Act XV of 1877 is reported in I. L. R., 16 Calc., 473, P. C. But in Radha Gobind *v.* Inglis, 7 C. L. R., 364, P. C. (a case governed by Act IX of 1871), where the land in dispute was *beel-bharati*, the first question raised and decided was the question of title. So also in Runjeet Ram *v.* Goburdhun, 20 W. R., 25, P. C. (a case of dispossession of a mouza, governed by Act XIV of 1859), where the evidence of possession on either side was equally strong, and the Privy Council *could not* decide the question of possession without the aid of "the *presumption* that possession went with the title." See also I. L. R., 19 Calc., 660, P. C.

Five Privy Council cases.

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from hearing, trying or determining the merits of any suit if it was barred by limitation. But even this provision did not prevent the Courts from considering the merits of the case, so far as such consideration was necessary to determine the question of limitation,—that is, to ascertain if the suit was actually barred.

Practice before and after 1859.

A literal interpretation of the section, however, might have prevented the Courts from going into the merits of cases which could be, and were, decided on the issue of limitation. But the practice[9] of the Courts was opposed to such *literal* interpretation. And now the language of the Limitation Acts, since 1859, is in this respect very different. In *Tarakanto Banerji* v. *Puddomoney Dasee*,[10] their Lordships of the Privy Council overruled the decision of the Sudder Court on the question of limitation, and, finding that the merits had not been entered into in the Courts below, remarked that it was much to be desired that, in appealable cases, the Courts below should, as far as may be practicable, pronounce their opinions on all the important points, so as to enable the Appellate Court to decide the appeal finally.

And in a later case[1] the Calcutta High Court observes that the objection of the special appellant, to the effect that when a case is decided on limitation, the Court cannot go into the merits, is untenable. There may be cases, specially such as are appealable to Her Majesty in Council, where it is very right that the merits should also be gone into, so that their Lordships of the Privy Council may be in a position, if they overrule the decision on limitation, to hear at once the appeal on the merits, and so save the parties from the trouble and expense of remands to this country. The same principle applies, more or less according to the circumstances of the case, to all appealable suits.

The *onus* as to the issue of limitation is on the plaintiff.

It is a settled rule of law that it is for the plaintiff to show *primâ facie* that his suit or right of action is not barred by limitation.[2]

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[9] See Gholam Russool *v.* Musst. Mugglo, 1 Moo. I. A., 446, in which the Sudder Court tried both the questions, and their decision was affirmed by the Privy Council.

[10] 10 Moo. I. A., 477; (S. C.) 5 W. R., P. C., 63.

[1] Shibo Doorga *v.* Syud Hossein, 6 W. R., 218; see also Sikher Chund *v.* Dulputty, I. L. R., 5 Calc., 363, 369; (S. C.) 5 C. L. R., 374, 379.

[2] Mohamed Ibrahim *v.* M. B. Morrison, I. L. R., 5 Calc., 36, 37. See also note 4, *infra*. Wilby *v.* Henman, 2 Cr. & M., 658, and Mahomed Ali *v.* Khajah Abdul Gunny, I. L. R., 9 Calc., 744, F. B. See the

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The Civil Procedure Code requires that the plaint should set forth the cause of action and when it accrued, and if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the ground upon which exemption from such law is claimed. (Sec. 26, Act VIII of 1859; sec. 50, Act X of 1877 and Act XIV of 1882).[3] Provisions of the Civil Procedure Code.

The Code further provides that, if the suit appear from the statement in the plaint to be barred by any positive rule of law, the Court shall reject the plaint.[4] (Sec. 32, Act VIII of 1859; sec. 54, Act X of 1877 and Act XIV of 1882). Thus the plaintiff is under the necessity of satisfying the Court that his claim is not barred by lapse of time. Nor does this obligation cease when the plaint has been admitted. If the defendant plead limitation, or if, although he do not plead it, it appear to the Court upon the facts that the suit was commenced after the period of limitation had expired, the Court is bound to call upon the plaintiff to prove that he has not forfeited his right of action. A suit which

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remarks of Edge, C. J., in Parmanand *v.* Sahib Ali, I. L. R., 11 All., 438, p. 447, and note 4, p. 99, *infra*. See also Pandurang *v.* Balkrishna, 6 Bom., 125, and p. 94, *infra*.

In Radha Prasad *v.* Bhajan, I. L. R., 7 All., 677, 680, the learned Judges, according to the report, say: "It is a well-known rule that if a defendant sets up the defence of limitation, he must plead it, *and show* that the claim is barred." This was only an *obiter dictum*. The facts of the case show that the plaintiff *did prove primâ facie* that his suit was not barred by limitation, and that the defendant failed to give *any* evidence of his special plea that the debt sued for fell due at an *earlier* date than that alleged by the plaintiff.

If the plaintiff's statement of claim showed, on the *face* of it, that the period of limitation had elapsed, the defence of the statute was not, even in England, required to be *pleaded*, but might be raised on *demurrer*. As to suits in which the right is *extinguished*, see Dawkins *v.* Penrhyn, 4 App. Cas., 51. As to *other* suits in equity, see Noyes *v.* Chawley, 10 Ch. D., 31, 36. Demurrers have been recently abolished, and the defence of limitation must be pleaded in England. See Orders, 19 and 25 of the Rules of the Supreme Court, 1883. For the Indian law, see p. 76, *supra*. Limitation, when a ground of *demurrer*.

As to the *onus* of *proof* of laches and acquiescence, see p. 74, *supra*, and Earlanger *v.* New S. P. Co., 3 App. Cas., 1218, at pp. 1230, 1286. Plea of laches. *Onus*.

[3] The Regulations of Bengal and Madras were *interpreted* as laying down the same rule. See Yachereddy's case, 5 W. R., P. C., 114, and p. 77, *supra*.

[4] In Raja Saheb Perhlad *v.* Moharaja Rajendro Kishore, 12 Moo. I. A., 289; (S. C.) 12 W. R., P. C., 6, 19, their Lordships of the Privy Council say: "Section 32 (Act VIII of 1859) shows that the plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time." Again in Mylapore *v.* Yeo Kay, I. L. R., 14 Calc., 801, at p. 805, their Lordships of the Privy Council say: "By the Act of 1882, which was the Civil Procedure Code in force when the suit was commenced, the *plaintiff must show* the grounds, &c., the cause of action, and when that cause of action accrued."

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Language of the Laws of Limitation.

is barred by limitation cannot be maintained in a Court of Justice. The words of the Law of Limitation as contained in Reg. III of 1793, sec. 14, and Act XIV of 1859, sec. 1, were distinctly *prohibitive*; and sec. 4, Acts IX of 1871 and XV of 1877, renders it *obligatory* upon the Court to dismiss a suit which is instituted after the prescribed period of limitation. If, therefore, any question or doubt on the subject arise, the plaintiff is bound to satisfy the Court (*primâ facie*) that it has not been induced to entertain a suit which the law has forbidden it to entertain.[5]

Rule as to the *quantum* of evidence required.

The Court will, however, as respects the *quantum* of evidence required, consider the opportunities which in particular cases each party may naturally be supposed to have of giving evidence.[6]

In a suit for breach of contract the plaintiff must prove that the breach of contract[7] or other event from which limitation commences to run occurred within the limited time.

Similarly, in a suit for a tort, the onus is on the plaintiff to prove that the malfeasance, misfeasance, nonfeasance, or other event from which limitation commences to run, took place within the prescribed period.

When the onus is shifted.

When the plaintiff's suit or proceeding is *primâ facie* within time, if the defendant alleges that the case is governed by a special clause allowing a shorter period of limitation, it is for him to satisfy the Court that the case comes under that special clause.[8] The burden of proof lies on the defendant, because he would fail if no evidence at all were given on this question on either side.[9] If the

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[5] See Pandurang Govinda *v.* Balkrishna Hari, 6 Bom., A. C. J., 125.

Shifting of *onus*, and *quantum* of evidence.]

[6] Rajah Kissen Dutt *v.* Norendra Bahadur, L. R., 3 I. A., 85. In this case the question was whether a suit for redemption was barred by limitation, and it depended upon the further question whether or not the term for redemption fixed by the instrument of mortgage had expired before 1856. The defendant's case was, that the instrument was lost in the mutiny, but that the term fixed by it had expired before 1856. It was held that the onus lay on the plaintiff to substantiate his case by giving some *primâ facie* evidence that the term did not expire before 1856, and that, as the plaintiff had given such evidence, the burden of proof was shifted on the defendant (the mortgagee), for it was *more in his power* to give accurate evidence of the contents of the instrument, than in that of the plaintiff.

[7] See Taylor and Bell, 131; and Rajah Indoobhoosun *v.* Mr. T. J. Kinny, 3 W. R., S. C. C. Ref., pp. 9, 10.

Plea of a shorter period. *Onus.*

[8] See Mohansing *v.* Conder, I. L. R., 7 Bom., 478. If a particular circumstance may be set up by the defendant in order to introduce a period of limitation shorter than that applicable to the facts proved by the plaintiff, it is for the defendant to raise that case in a proper way and to prove it. Danmull *v.* B. I. S. N. Co., I. L. R., 12 Calc., 477, at p. 481.

[9] See sec. 102, Act I of 1872.

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defendant wishes the Court to believe in the existence of particular facts, which if believed would operate as a bar to the suit, it is for him to prove those facts,[10] except perhaps when the facts are specially within the knowledge of the plaintiff.[1] And when the charge is made of *want* of *bonâ fides*, it certainly lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.[2]

Plea of earlier accrual of cause of action.

In a suit on a bond or a promissory note payable at a fixed period *after demand*, where the plaintiff contends that the demand was made *within* the period of limitation, the burden of proving an *earlier* demand lies on the party who pleads limitation.[3] But here, as in other cases, the

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[10] See sec. 103, Act I of 1872.

[1] See sec. 106, Act I of 1872, and note 6, *supra*.

[2] Benoderam Sein *v.* Brojendro Narain, 21 W. R., 97, P. C.

[3] See Brown *v.* Rutherford, 14 Ch. Div., 687. A note payable "on demand" is immediately payable, but a note payable three months *after demand* gives no cause of action unless a demand has *actually* been made. See art. 72, Sched. II, Act XV of 1877.

Where the defendant contends that the debt sued for fell due on an *earlier* date than that alleged by the plaintiff, the onus is on him to prove his plea. (Radha Prasad *v.* Bhajan, I. L. R., 7 All., 677, 681). Similarly in a suit for ejectment, if the defendant alleges that the plaintiff was dispossessed on an earlier date than that stated by the plaintiff, the onus is on the defendant to prove his allegation. (*Per* Petheram, C. J., and Porter, J., in second appeal No. 707 of 1885, decided on the 20th August 1886. Calcutta). In this case the plaintiff alleged that he had been dispossessed within three years of the suit. The defendant *admitting the title* of the plaintiff pleaded limitation, but did not give *any* evidence as to the date of dispossession. The High Court *presumed* that the plaintiff was in possession up to the date alleged by him. But this was hardly in accordance with the principles laid down in Mahomed Ali *v.* Khajah Abdul Gunny, I. L. R., 9 Calc., 744, F. B.; and Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175. It is true, the plaintiff is not bound to prove by *direct* evidence that he was dispossessed *within* the twelve years. A *presumption*, *properly* arising in the case, may supply the place of evidence. Thus where the plaintiff, admitting that he was dispossessed by the defendants in 1871, sues to recover possession of some *beel-bharati* lands in 1881, and proves his *title and his possession* of the *beel* in 1857, the possession of the plaintiff may *properly* be *presumed* to have *continued* to the date of his admitted dispossession *if* the evidence adduced in the case does not enable the Court to find that *either* party was in possession on that date or at any time between 1857 and 1871. This view is in accordance with the decision in 20 W. R., 20 P. C. (See Raj Kumar *v.* Gobind Chunder, L. R., 19 I. A., 140; (S. C.) I. L. R., 19 Calc., 674. The *mere* proof of anterior *title* is not enough to shift the burden of proof upon the defendants to show that they are entitled to retain possession. In a suit for ejectment the *onus* is *primarily* on the plaintiff to prove his possession prior to the time when he was admittedly dispossessed, and at some time *within* twelve years before the commencement of the suit. It does not lie upon the defendants to show that the plaintiff was dispossessed *before* the twelve years.

Rule misapplied, where plaintiff fails to make out a *primâ facie* case.

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plaintiff must show *primâ facie* that his cause of action arose within the limited time, before the onus is shifted to the defendant. It is not necessary to prove the earlier demand (or any other fact) by *direct* evidence. The evidence afforded by circumstances may be sufficient.[4]

In a suit under art. 127 of Act IX of 1871, by a Hindu excluded from joint family property, to enforce a right to share therein, when the plaintiff shows *primâ facie* that his case falls under that article (*Obhoy Churn* v. *Gobind Chunder*, I. L. R., 9 Calc., 237), it is for the defendant to show that the plaintiff claimed and was *refused* his share *more than twelve years before* the institution of the suit. (*Hansji* v. *Valabh*, I. L. R., 7 Bom., 297). See notes to art. 127, Act XV of 1877, in the Appendix.

Onus in suits for declaration or possession.

As a *general* rule, a plaintiff (in a suit for a declaration of title or for ejectment) must not only show that he has a title, but that he has a subsisting title which he has not lost by the prescriptive sections of the Limitation Act.[5]

When plaintiff alleges that he has been *dispossessed*, and sues to recover possession, the ordinary rule applied is that the onus is on him to prove possession and dispossession within the prescribed period. He is bound to satisfy the Court that he has had possession within that period, but it may not always be necessary for him to prove that possession by positive acts of ownership; the Court may in *some* cases *presume* in his favor from the fact of *previous* title and possession.[6]

Speaking of suits for the recovery of immoveable property (under sec. 1, cl. 12, Act XIV of 1859), Sir Richard Couch, C. J., says: "It has been settled that the *plaintiff* must show that he or some one through whom he claims

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(Mohima Chunder v. Mohesh Chunder, I. L. R., 16 Calc., p. 479, P. C.) The onus is shifted *after* a *primâ facie* case has been made out by *direct or presumptive* evidence.

[4] Ram Chunder Ghoshal v. Juggut Monmohinee Debi, 3 C. L. R., 336, 348; I. L. R., 4 Calc., 283; and Brown v. Rutherford, 14 Ch. Div., 687. An offer of payment of the principal or an actual payment of interest before suit has been considered sufficient to raise the *presumption* of a previous demand.

[5] Secretary of State v. Vira Rayan, I. L. R., 9 Mad., 175; Darby and Bosanquet, p. 221. See pp. 99, 103 *et seq*, *infra*. The plaintiff must prove a *subsisting* right to the property in suit, *i.e.*, a right which has not been extinguished by sec. 29, Act IX of 1871 or sec. 28, Act XV of 1877. (Parmanand v. Sahib Ali, I. L. R., 11 All., 438, at pp. 446, 447).

[6] Mohini Mohun Dass v. Kristo Kishore Dutt, 12 C. L. R., 337; I. L. R., 9 Calc., 802. Acts of dispossession within twelve years need not in every case be proved by *direct* evidence. Ram Coomar v. Gobind Chunder, L. R., 19 Ind. App., 140; S. C. I. L. R., 19 Calc., 660, p. 674. See note 3, *supra*.

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has had possession within twelve years before the suit. If he sues for the recovery of immoveable property on the ground of having been dispossessed from it, he must show that he has come within twelve years from the time when his cause of action arose—the time when he was dispossessed. It is not enough for him to prove his title to the property which is the subject of the suit, and leave it to the defendant to show that the suit is barred by the law of limitation by proving when the plaintiff was last in possession. It has been considered, looking at the way in which the law of limitation is framed, that the plaintiff is bound to give evidence of that kind."[7] Applying this rule to suits for shares in joint family property (under cl. 13, sec. 1, Act XIV of 1859), it was held that the onus was on the plaintiff to show that he had possession of his share, or received payments on account of it, within twelve years from the institution of the suit.[8]

On the question of limitation in a case[9] of ejectment (under Act XIV of 1859) Mr. Justice Melvill says: "The burden of proof being upon the plaintiff, what is he required to prove? Simply that the cause of action accrued within the period of limitation made applicable to the suit.[10] This is by no means equivalent to saying that a plaintiff, in an action of ejectment, must prove that he has been in possession within twelve years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period.[1] If a man buy a piece of open ground, he is not

What the plaintiff is required to prove in ejectment.

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[7] Gossain Dass *v.* Seroo Kumari, 19 W. R., 192. This was also the rule in suits for ejectment governed by the Regulations. See Maharaja Koowar *v.* Baboo Nund Lall, 1 W. R., P. C., 51; (S. C.) 8 Moore's I. A., 199; also Rajah Shaheb Perhlad *v.* Budhu Sing, 12 W. R., P. C., 6, 19; Beer Chunder Joobraj *v.* Deputy Collector of Bhullua, 13 W. R., P. C., 23. It may be observed that, in all these three cases, the plaintiff admitted having been actually *dispossessed* by the defendant for ten or eleven years before the institution of the suit. Sir Richard Couch's remarks also evidently refer to suits for possession of immoveable property when the plaintiff, while actually or constructively in possession of the property, has been *dispossessed* or has discontinued the possession.

Under the Regulations.

[8] Gossain Dass *v.* Seroo Kumari Debia, 19 W. R., 192.

[9] In Pandurang Govinda *v.* Balkrishna Hari, 6 Bom., A. C., 125, p. 128.

[10] In exceptional cases, where the period of limitation runs from a time posterior to the accrual of the cause of action, the plaintiff need only show that he is within time from the starting point fixed by law. For an example, see No. 10, Sched. II, Acts IX and XV; and sec. 1, cl. 1, Act XIV of 1859. See Lekranee Koer *v.* Janki, W. R., 1864, p. 285. The cause of action in a pre-emption suit is the sale to a stranger, but the *punctum temporis* is not the date of the sale.

Exceptional cases. Pre-emption.

[1] Thus, in suits by a reversioner or remainderman, or by a person who is not entitled to immediate possession at the time when

Suits by reversioners.

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bound to enclose it or to build upon it or formally to take possession of it; nor, if he does formally take possession of it, is he bound to proclaim by subsequent acts the continuance of his possession: so long as the land remains unoccupied his rights are not interfered with, and he is not called upon to assert them. He has no cause of action, and there is no person whom he can sue. His cause of action accrues when *another person* takes possession of the land, and not before. If he has omitted to take possession of the land himself, he may not be able to treat the intruder as a trespasser, but he can bring an action to eject him at any period within twelve years from the date of the intruder's occupation of the land."[2]

Accrual of cause of action.

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the defendant first takes possession of the property, the cause of action arises only when the estate falls into possession.

[2] Sir Richard Garth considers these remarks of Melvill, J., about possession, to be applicable to *all* cases where the production of direct evidence of possession is either difficult or impossible (Mahomed Ali Khan v. Khajah Abdul Gunny, I. L. R., 9 Calc., 744, 756); Wilson, J., appears to consider them applicable only to waste, unenclosed, or unreclaimed lands (Manomohun v. Mothuramohun, I. L. R., 7 Calc., 225, 230).

Judgment of Melvill, J., explained.

In the case supposed by Melvill, J., it is evidently assumed that the vendor gives up his own possession. It follows, that the vendee obtains *possession* of the ground from the date of purchase and delivery, and is therefore in a position to prove his possession in *law*, though he never takes *actual* possession of the same. If the vendor being in possession refuses to deliver possession to the vendee, the latter must ordinarily bring his suit against the former, or his representatives or assigns, within twelve years from the date of purchase. In a suit for possession, when the plaintiff, while in possession, has been dispossessed or has discontinued the possession, the cause of action being the dispossession or the discontinuance, the plaintiff must prove that he lost his possession within twelve years. Discontinuance of positive acts of ownership, however, does not necessarily amount to loss, or discontinuance of possession in *law*. A stranger must have entered into possession before the possession of the owner can (in the absence of express abandonment) be said to have discontinued. The term "possession" in the judgment quoted above apparently means *actual* possession. Possession *in law*, continues, until *another person* interferes with it. See M'Donnell v. M'Kinty, 10 Ir. L. R., 514; Smith v. Lloyd, 9 Exch., 562, on which the Bombay case as well as the case of the Agency Co. v. Short, 13 App. Cas., 793, is based. See Lecture VI.

Suits under art. 144, Act XV.

And in suits falling under art. 145 of Act IX of 1871, and art. 144 of Act XV of 1877, it is not necessary for the plaintiff to prove that he was in possession within the period of twelve years, provided the suit is brought within twelve years of the time when the possession of the defendant or his predecessor in interest became adverse to the plaintiff. Monwar Ali v. Unnoda Persad, I. L. R., 5 Calc., 644, at p. 653, P. C.; and Karan Sing v. Bakar Ali, I. L. R., 5 All., 1, P. C.; Gopal Chunder v. Nilmoney, I. L. R., 10 Calc., 374, at p. 379; Gopi Nath v. Bhugwat, I. L. R., 10 Calc., 697. If the plaintiff proves a subsisting title, the onus is shifted to the defendant to prove that he has been in adverse possession for twelve years before suit. (See also Faki Abdulla v. Babaji, I. L. R., 14 Bom., 458; Alima v. Kuti, I. L. R., 14 Mad., 96).

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In a case[3] before the Privy Council in 1880, the plaintiff claimed certain lands included within the limits of a *beel*, or lake. The land so claimed had become dry and culturable during, at least, a part of the year. The proprietor of a neighbouring talook was the defendant, and he denied the plaintiff's title to the soil of the *beel*, and relied on adverse possession for more than twelve years before the institution of the suit. The plaintiff having given evidence of his ancestor's possession of the *main talook* to which the *beel* appertained, and proved his title to the soil of the *beel* itself, their Lordships said: "The question remains whether the disputed land had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff, by the operation of the Statute of Limitation. On this question, undoubtedly, the issue is on the defendant. The plaintiff has proved his title; *the defendant must prove* that the plaintiff has lost it by reason of his, the defendant's, adverse possession."[4]

Where the land in suit is *beel-bharati*.

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[3] Radha Gobinda Ray *v.* Inglis, 7 C. L. R., 364, P. C.

[4] The expression "defendant's adverse possession" in this judgment, perhaps, means nothing more than (what, in *law*, amounts to) "plaintiff's non-possession." The term *adverse* does not occur in art. 142, Act XV or art. 143, Act IX, under which the suit appears to have been brought. (See Nawab Muhammad *v.* Badan, I. L. R., 17 Calc., 137, P. C.) The ruling in Radhagobiud's case, as to the shifting of the onus of proof, appears at first sight to be opposed to other decisions of the Privy Council, especially to the decision in Maharaja Koowar Sing's case—8 Moore, 199, (S. C.) 1 W. R., P. C., 51—in which it was held that no proof of anterior title in the plaintiff can shift the onus upon the defendant of proving the time and manner of dispossession. In this case the evidence of the time of dispossession was almost *equally weak* on both sides, but as the *onus* was on the plaintiff, their Lordships dismissed the suit without entering into the question of title. See also the later case of Mohima Chunder *v.* Mohesh Chunder, I. L. R., 16 Calc., 473, P. C., in which the defendant gave cogent evidence of his possession for more than twelve years, but their Lordships of the Privy Council dismissed the plaintiff's suit, *without considering that evidence*, on the ground that the plaintiff failed to prove that he was dispossesed within twelve years. In this case, as well as in Maharaja Koowar Sing's case, their Lordships appear to have *assumed* that plaintiff was at some time lawfully in possession of the disputed land, and so assuming held that the *onus* was still on the plaintiff to prove that he was dispossessed within twelve years of the institution of the suit. In both these cases, the condition of the land in dispute which was cultivated, did *not* offer any *difficulty* in the proof of possession. It may be also observed that the question of limitation was in both these cases taken up first, and the question of title was not entered into. See Kali Churn *v.* Secretary of State, I. L. R., 6 Calc., 725; and Monmohun *v.* Mothura Mohun, I. L. R., 7 Calc., 225, where the conflicting decisions are attempted to be reconciled in two different ways.

The two Privy Council rulings considered by the High Courts of Calcutta, Bombay, Madras, and Allahabad.

In Kali Churn's case, Sir Richard Garth (incorrectly) assumed that the plaintiff in Maharaja Koowar's case *did not attempt* to prove any possession at *any* time before suit, and added that, in Radha Gobind's

High Court, Calcutta.

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Where it is a *khal* or *khal-bharoti* land.

In Sunnud Ali's case (9 W. R., 124) Sir Barnes Peacock, C. J., pointed out that, when lands which are not in their nature capable of actual occupation (such as a *khal*) appertain to lands which are occupied, the possession of the

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case, the plaintiff *did prove* his ancestor's possession, though not within the statutory period. In Monmohun's case, Wilson and Field, JJ., distinguish the two Privy Council cases by pointing out that the second case related to land recently formed by the gradual drying up of a lake belonging to the plaintiff, while the first referred to land which was occupied and was from before susceptible of actual and visible possession. In a later case—Mahomed Ali Khan *v.* Khajah Abdool Gunny (I. L. R., 9 Calc., 744 ; 12 C. L. R., 257, F. B.) —Sir Richard Garth distinguishes the two Privy Council cases by remarking that the second case proceeded upon the well-known rule that a title *and seisin*, when once established, must be *presumed* to *continue*, at least in cases where there is *no direct evidence of possession*, and where such evidence is, from the nature of the case, either *difficult* or *impossible* to obtain, and by adding that the defendants who apparently had first brought the bed of the *beel* into cultivation were presumably *better able* to prove when and how the cultivation had commenced. In the same case, Mitter, McDonell, Prinsep, and Wilson, JJ., were of opinion that the distinction depended upon the *character and condition of the land* in dispute in the two cases ; that if the land is incapable of any beneficial use, or if it produces some trifling profit now and then, if it is permanently or temporarily incapable of actual enjoyment in any of the customary modes, as by residence, or tillage, or receipt of a settled rent, the principle of *presumption* may be resorted to, and that the Privy Council gave the plaintiff in the second case the benefit of the presumption *because* the land was *beel-bharoti*. Turner, C. J., and Ayyar, J., in Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175, say : "The probable explanation of the ruling in Radha Gobind's case is that, when a plaintiff proves *title and possession*, it is to be *presumed* that his possession *continues* till the defendant proves that the possession was interrupted." In Moro Desai *v.* Ramchandra, I. L. R., 6 Bom., 508, Melvill, J., refers to the apparent inconsistency of the Privy Council decisions, and without attempting to reconcile them holds that the few remarks in Radha Gobind's case could not have been meant to upset the old rule applicable to ordinary cases of ejectment. In Sarsuti *v.* Kunj, I. L. R., 5 All., 345, at p. 354, F. B., it was held that, under the authority of Radha Gobind's case, proof of title is sufficient to shift the onus of proving extinction of title by limitation to the defendant. In Parmanand *v.* Sahib Ali, I. L. R., 11 All., 438, Edge, C. J., explains the ruling in Sarasati's case, as well as that in Radha Gobind's case, by suggesting that the plaintiff in those cases did prove a *subsisting title*, *i.e.*, a title *not extinguished* by limitation. It may be mentioned here that in the latter part of the judgment in Radhagobind's case, their Lordships of the Privy Council observe that the plaintiff-respondent before them did give evidence to prove that the land in suit had been newly formed, *i.e.*, that it had been formed within less than twelve years before the commencement of the suit, and that in that view limitation could not apply to the case. In Rajkumar *v.* Gobind Chunder (I. L. R., 19 Calc., 660, at p. 675) their Lordships of the Privy Council had an opportunity of examining the subsequent cases, but they declined to do so, as the plaintiff-respondent before them had sufficiently discharged the burden of proof, if it was for the plaintiff to prove possession within twelve years, in every case.

The two P. C. cases how reconciled. See also notes, pp. 95, 103, and 108.

Madras.

Bombay.

Allahabad.

Privy Council.

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Khals and *Khal-bharati* land.

former follows that of the latter; that, generally speaking, a *khal* would continue in the possession of the person in possession of the lands to which it appertains until it dries up and becomes culturable; but if any one to whom it does not belong takes possession of it even before it becomes culturable, a cause of action accrues to the party entitled from the time of such wrongful possession; that the same law of limitation applies to *khals* and *bharat* lands as to other lands, though with regard to the former there might be more *difficulty in determining the time at which wrongful possession was taken;* that, looking to the nature of *khal-bharat* lands and the presumption that the person in possession of the *main land* to which it appertains was by implication in possession of that which appertained to it until some one else took actual possession, *it would be for the defendant to show that he took possession of the land* at a time more than twelve years before the commencement of the suit; and that even in the case of such lands the Court had to try (with reference to these remarks) whether the plaintiff was in possession of the land within twelve years before the commencement of the suit.[5]

In the case of waste or *jungle* lands.

As to the *presumption* of possession, Sir Richard Garth, C. J., in *Mohima Chunder Dey* v. *Hurrolal Sircar*,[6] said: "In some cases, as for instance where grants or leases have been made of waste or jungle lands and the right to these lands is disputed, it is often *impossible to give evidence of acts of ownership or possession* over the property because it is uninhabited and uncultivated, and no acts of ownership by any one have been exercised over it. In such cases it is often necessary, for the purpose of deciding the question of limitation, to rely upon very slight evidence of possession, and sometimes possession of adjoining land coupled with evidence of title, such as grants or leases; and the

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[5] As to the onus and the presumption in these and analogous cases, see Messrs. Watson & Co. *v.* The Government, 3 W. R., 73, 80, 82 (jungle or uncultivated lands); Sunnud Ali *v.* Mussamut Kurrimoonnissa, 9 W. R., 124 (*khals* and *khal-bharati* lands); Mahomed *v.* Kurrim, 11 W. R., 268 (*beel* lands); Raja Leelanund *v.* Mussamut Basseeroonnissa, 16 W. R., 102, and Mahomed Ali *v.* Abdul Guny, I. L. R., 9 Calc., 744 (jungle land); Moocheeram *v.* Bissambhur, 24 W. R., 410 (unoccupied and exceedingly narrow strip of land); Monmohun Ghose *v.* Mothura Mohun Roy, 8 C. L. R., 126; (S. C.) I. L. R., 7 Calc., 225 (*reformed* alluvial lands as opposed to new *accretions*). As to new lands gained from the river, see Luchmee *v.* Jatadharee, 7 W. R., 89, 457, and Mahomed Ibrahim *v.* Morrison, I. L. R., 5 Calc., 36. As to *beel-bharati* lands when the *beel* is private property, see Radhagobind's case, 7 C. L. R., 364, at p. 368, and note 5, p. 100, *supra*. Case of *khals*, *beels*, *jungles*, accretions, reformations, and narrow strips.

Where possession in *fact* is *undetermined*, possession in *law* follows the *right* to possess. Pollock on Possession, p. 24.

[6] 2 C. L. R., 364.

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Courts are justified in presuming, under such circumstances, that the party who has the title has also the possession."

Where evidence of acts of ownership is forthcoming, and where it is not.

Again, in *Rambandhu* v. *Kasu Bhatta*,[7] Sir Richard Garth observed that, as long as reliable evidence of acts of ownership is *forthcoming*, there is no difference between the proof of possession in the case of jungle or waste or uncultivated land, and that in the case of cultivated lands; and such proof is oftentimes forthcoming, as in the cutting down of trees, grazing of cattle, or putting up of boundary marks or fences, and the like.[8] But it does sometimes happen that neither party to a suit has exercised any acts of ownership at all over the lands in question which are capable of proof, and then in the doubt created by such *absence of* proof, or of reliable proof, the Court is obliged to resort to evidence of title, and to *presume* that the party who has the title has also the possession.[9] Where there is *evidence* of some acts of ownership, it would be right for the Court to decide the case upon that evidence, so far as the question of possession is concerned, without resorting to the proof of title.[9]

Where possession under a title is proved, but not within the prescribed period.

In *Kali Charan Sahu* v. *The Secretary of State*,[10] Sir Richard Garth, C. J., attempted to reconcile the Privy Council decision in Maharajah Koowar Sing's case, 8 Moore's I. A., 199, with that in Radhagobind's case, 7 C. L. R., 364, and remarked that the laws of limitation and civil procedure made no distinction between different kinds of land; that the presumption must in one case be the same as in another; that dispossession must mean the same thing in one case as in another; that the reason of the law applied equally in the case of cultivated land as in the case of jungle land or land covered by water[1]; that in suits

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[7] 5 C. L. R., 481.

[8] In Watson v. The Government, 3 W. R., 73, 80, Sir Barnes Peacock, C. J., referred to the habit of cutting or preserving the wood, gathering wax or wild honey, collecting sticklac, &c., as some evidence of possession of jungle lands.

Even where land is cultivated, and evidence is forthcoming.

[9] But even in suits for land which is cultivated or otherwise occupied, the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession on the part of the plaintiff, opposed by evidence apparently strong also on the part of the defendant, in estimating the weight due to the evidence on both sides, this presumption is *sometimes* regarded. Runjeet Ram v. Goburdhan, 20 W. R., 25, P. C. In this case the plaintiff's suit was, with the aid of this presumption, held to be within time. See note, p. 108, *infra*.

[10] 8 C. L. R., 90; I. L. R., 6 Calc., 725.

[1] Turner, C. J., and Ayyar, J. (in Secretary of State v. Vira Rayan, I. L. R., 9 Mad., 175, at p. 183), express their concurrence with this observation. Peacock, C. J., was also of this opinion. (Sunnud Ali v.

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brought as upon a dispossession by the defendant, if the plaintiff proved his title *and possession at any time* before suit, such possession was *presumed* to have *continued* until the dispossession by the defendant, so that the onus was thrown upon the defendant to prove when such dispossession first occurred.[2] In Kalichurn's case, Sir Richard Garth appears to have erroneously assumed that the plaintiff in the case reported in 8 Moore, gave *no* evidence of *possession*, while the fact was that a considerable body of evidence was adduced on both sides, and their Lordships, after considering that evidence and the balance of probabilities on either side, decided in favor of the defendant. In the Full Bench case, Sir Richard Garth was of opinion that their

P. C. Cases explained by Garth, C. J.

Musst. Kurrimoonnissa, 9 W. R., 124). In Agency Company *v.* Short, 13 App. Cas., 793, at p. 799, their Lordships (Lord Macnaghten, Sir Barnes Peacock, and Sir Richard Couch) held that there is no difference in principle as regards the application of the statute of limitation between the case of *mines*, and the case of *other land* where the fact of possession is more open and notorious.

[2] This view of the effect of proof of *title and prior possession* is in accordance with that of the majority of the Judges in Poole *v.* Griffith, 15 Ir., C. L. R., 239, 279, and with that of Turner, C. J., and Ayyar, J., in Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175; but it is opposed to the ruling of the majority of the learned Judges in Mahomed Ali Khan *v.* Abdul Gunny, I. L. R., 9 Calc., 744, F. B. In Rajkumar Roy *v.* Gobind Chunder Roy, their Lordships of the Privy Council, without *deciding* the question raised by these and other cases, say that they are not disposed to differ from the view taken by the High Court in that case, that when plaintiff shows title and possession of a *beel* in 1857, his possession *may be presumed* to have continued to (1869) the alleged time of dispossession of the *beel-bharati* land, provided the evidence adduced does not enable the Court to find that either party was in possession at that time. It appears that where the presumption of the *continuance* of the true owner's *possession* may be resorted to, the doctrine of *presumitur retro* (in favor of the existing possession of the defendant) must give way. (I. L. R., 19 Calc., 660, at pp. 673, 674. Cf. I. L. R., 14 Calc., p. 748, P. C.)

Presumption of continuance of possession. (*Presumitur retro*).

Messrs. Darby and Bosanquet, in their treatise on the Statutes of Limitation, make the following remarks on the subject of proving the commencement of wrongful possession: "In consequence of the Statute not operating unless there is an actual wrongful possession, as well as discontinuance of possession by the rightful owner, a question of great practical importance arises in ejectment where the plaintiff proves title and possession under it, but not within the statutory period dating back from the commencement of the action, namely, whether the onus of proving *when the wrongful possession began* is on the plaintiff or defendant. As the general rule in ejectment is, that the plaintiff must recover by the strength of his own title, and not by the weakness of that of the defendant, and must prove not merely a right of property, but a possessory title unbarred by the Statute of Limitations (Taylor and Horde, 1 Burr., 60, 119; Nepean *v. Doe d.* Knight, 2 M. & W., 894; Cole on Ejectment, 6), it would seem on principle that the onus should be on the plaintiff, and this was the opinion of Pigot, C. B., in a case in the Exchequer Chamber in Ireland, and of two of the Judges in the same case in

English authorities on the question of *onus*.

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Lordships did *not*, at all events, *find* that the plaintiff (in 8 Moore) or his ancestor *had ever in fact been in possession*, and that in Radhagobind's case the onus was thrown on the defendant, because plaintiff's title and prior possession had been found as a fact. On the other hand, Mitter, McDonnel, Prinsep, and Wilson, JJ., held that their Lordships of the Privy Council in the case in 8 Moore, treated the question of possession (of cultivated lands) at any period *prior* to twelve years as wholly *immaterial*. (See I. L. R., 9 Calc., 744, at pp. 750 and 757). In this case the learned Chief Justice restricted the application of the *presumption* to cases where there was no direct evidence of possession, and where such evidence was, from the nature of the case, either difficult or impossible to obtain. But the majority of the Judges held that the presumption (of continuance of possession) was not, and should not be, resorted to except where the land was unfit for actual enjoyment in the usual modes.

The opinions of Wilson and Field, JJ., on the question of onus.

In *Manomohun Ghosh* v. *Mathura Mohun Roy*,[3] Wilson and Field, JJ., considered the question of *onus* in cases of gradually diluviated and gradually reformed land both from the point of view of principle and from that of authority. Justice Wilson said: "Certain propositions of the Court below, but all the other Judges, seven in number, seem to have thought the onus lay on the defendant. (See Poole v. Griffith, 15 Ir., C. L. R., 239; S. C. in error, *ibid.*, 277). The majority of the Judges seem, indeed, partly to have grounded their decision on the opinion that the execution of a lease by one through whom the plaintiff claimed and continuous payment of rent under the lease afforded some presumptive evidence against the defendants, both that the lessee at the time the lease was granted was put into actual possession, and that he *continued* in such possession. The other three Judges dissented from this."—Darby and Bosanquet, pp. 221, 222.

English authorities.

Mr. Brown, in his work on the Law of Limitation as to real property, p. 80, observes: "In Poole v. Griffith (15 Ir., C. L. R., 239) the Court said that, as chap. 27 (3rd and 4th Will. IV) bars not only the remedy but also the right, the claimant must show, within that time, not only a right, such as may exist on paper or parchment, but a title to the possession unbarred by the statute (Nepean v. *Doe* d. Knight, 2 M. & W., 894); and that, when such a title is shown, the defendant, to displace it, must on his part show a title sufficient for that purpose, and cannot rest on simple possession. An adverse possession for twenty years would sustain such a title, but must be proved. But in the same case in error (15 Ir., C. L. R., 288), Pigot C. B., said he saw nothing in the second and third sections of the Statute, or, in the authorities by which they have been expounded, to abridge the protection given to possession, or to shift from a plaintiff the burden of proving a possessory title unbarred by the Statute of Limitations; or, in other words, to enable him to recover upon the weakness of the title of his adversary instead of upon the strength of his own." The views of Wilson, J., in the Calcutta cases, are similar to those of Pigot, C. B., in the Irish case.

[3] 8 C. L. R., 126; I. L. R., 7 Calc., 225.

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law upon the subject are undoubted. It is not disputed that, as a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years—*Maharaja Koowar Sing* v. *Nunda Lal Sing*, 8 Moo. I. A., 199, 200. Wilson, J. First proposition.

"Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case. In the case of a house actually occupied, or land under cultivation or yielding a rent, proof of possession is easy. In many cases, as of lands incapable of cultivation, jungle or waste lands, unenclosed plots of various kinds, all the proof that can commonly be given is to show possession taken, or acts of ownership done, *at some time*, which possession will in law *continue* until the possessor by his conduct shows that he means to *relinquish* his possession or he is *excluded* by some one else. These considerations, however, affect *the mode of proof*, not the *burden of proof*. The general rule still is, that the *plaintiff must prove* that he has been dispossessed within twelve years[4]—see *Pandurang* v. *Balkrishna*, 6 Bom. H. C. R., 125. (Proof and presumption).

"But there are many cases in which the party on whom the burden of proof in the first instance lies may shift the burden to the other side by proving facts giving rise to a presumption in his favor.

"As to such cases (cases of lands gradually diluviated and gradually reformed) a second proposition is, I think, beyond question, that when the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the reformation, must at least show that he was in possession down to the date of the diluviation.[5] Second proposition.

"A third proposition is now, I think, beyond dispute, that where the true owner is in possession at the time of diluviation his possession is presumed to continue as long as the land continues submerged, probably also afterwards, until he is dispossessed. This proposition, however, would not be sufficient to shift the burden of proof. It would leave it upon the plaintiff, but would enable him to prove his case either by showing the dispossession to have been in fact within twelve years, or that the submergence Third proposition.

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[4] See on this point, Sunnud Ali *v.* Kurrimoonnissa, 9 W. R., 124.

[5] The fact of an intermediate diluviation of the land cannot remove the bar of limitation, unless the plaintiff proves his possession before and at the time of the commencement of the diluviation. Gokool *v.* David, 23 W. R., 443. See p. 107, *infra*.

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has continued down to within twelve years; so that his possession cannot have been interfered with more than twelve years ago." Mr. Justice Wilson goes on to show that, where plaintiff proves his possession down to the period of diluviation, the Court may further, if it thinks proper under the circumstances of the case, presume the submergence,* and with it the plaintiff's possession, to have continued until the contrary is shown. It is only when this presumption is made that the burden is shifted to the defendant of proving his own possession for twelve years, including the fact that the land has been reformed for more than twelve years. The learned Judge also points out that in the case of new alluvial lands *gained* from the river or sea, *this* presumption, which presupposes *prior* possession, does not arise.†

Presumption of continuance, and shifting of onus.

(Accretions and reformations).

Field, J.

Mr. Justice Field in the same case observes that, "although, according to general rule, it lies upon the plaintiff who is met with the plea of limitation to show his own possession within twelve years before the institution of the suit, when the property in dispute is capable of actual and visible possession, yet that, from the nature of the thing, an exception must be made to this general rule in the case of property which is not susceptible of actual and visible possession. In respect of this latter class of cases, it appears to be only reasonable to say that when the *title and possession* have been proved to be in a certain person up to a certain point of time,‡ when there has been no transfer of the title to any third person, and there is no evidence that possession was exercised by a person other than the person having the title, so long as actual and visible possession was possible, the possession of the person having the title will be *presumed* to continue until the property has again become susceptible of actual visible possession. A *presumption* dispenses with or supplies the place of *evidence*. If the above be a reasonable presumption, it takes the place of evidence to show the plaintiff's possession within twelve years before suit in a property in which, from the nature of the thing, evidence of actual possession is *impossible*."

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* The well-known presumption in favor of the continuance of a physical condition, which in the ordinary course of things is likely to continue, is embodied in sec. 114, Illus. (*d*) of the Evidence Act.

† But where alluvial land is claimed as an accretion to a riparian estate, the presumption referred to in Sunnud Ali *v.* Musst. Kurrimoonnissa, 9 W. R., 124, may arise. See p. 100, *supra*.

‡ Mr. Justice Field does not say that it is necessary for the plaintiff to prove (by *direct* evidence) that he was in possession down to the date of the diluviation.

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The possession of land under a *claim of right* by a person having really *no title* to it will also be *presumed* to continue when the land diluviates and is covered with water. The diluviation does *not* put an end to his wrongful possession and restore the true owner to possession during the time that the submersion continues.[9] Time begins to run against the true owner when the wrong-doer first takes possession of the land, and it continues to run, irrespective of whether the land is or is not capable of occupation by reason of its submersion. The possession of a wrong-doer who might have held the land for only a year before it was washed away might thus ripen, as it were, under the water into a title, if the true owner neglected to bring his suit for ejectment for twelve years from the actual date of the wrongful possession of such land. To preserve his right the owner should bring his suit within the limited period, whether at the time of suit the land is capable of occupation, or is lying under water in consequence of a diluviation.[10] But if the person who is wrongfully in possession voluntarily *abandons or relinquishes* his possession (*before* he has acquired a title under the statute) the true owner is remitted to his old possession, and limitation ceases to run against him because there is *then* no one against whom he can bring an action of ejectment.[11]

Wrongful possession of land, under a claim of right, before diluviation.

Abandonment of wrongful possession.

The question of the burden of proof was afterwards considered by a Full Bench of the Calcutta High Court, and the following propositions have been laid down by the majority of the Judges:[1]

The ordinary rule is, that under Act XIV of 1859, the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and that it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is *dispossession*, the plaintiff is bound to prove possession and dispossession within twelve years.

The Calcutta F. B. ruling on the question of *onus*.

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[9] Kalichurn *v.* Secretary of State, I. L. R., 6 Calc., 725. According to Garth, C. J., the wrong-doer has *constructive* possession during the period of submersion.

[10] *Ibid.*, at p. 740. White, J., was of opinion that, at all events, the submersion of the land does not stop the running of time against the true owner.

[11] Agency Company *v.* Short, 13 App. Cas., 793. If a second intruder subsequently takes actual possession of land so abandoned, time will run against the true owner only from the date of such actual possession.

[1] Mahomed Ali Khan *v.* Khajah Abdul Gunny, I. L. R., 9 Calc., 744; 12 C. L. R., 257 (F. B.) The rules laid down here are substantially the same as those enunciated by Mr. Justice Wilson in Manomohan *v.* Mathuramohan, 8 C. L. R., 126; I. L. R., 7 Calc., 225.

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As a general rule the plaintiff cannot, merely by proving possession at *any* period *prior* to twelve years before suit, shift the *onus* to the defendant.

Where the land is incapable of actual enjoyment in any of the usual modes.

But possession is not necessarily the same thing as actual user or enjoyment. Where the land is incapable of any beneficial use, or where it yields some trifling profit only now and then, where it is permanently or temporarily incapable of actual enjoyment in any of the usual modes as by residence, tillage or receipt of a settled rent, it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this, his possession is *presumed* to continue as long as the state of the land remains unchanged, *unless he is shown to have been dispossessed.*[a] Where lands are, by natural causes (such as diluvion) placed wholly out of the reach of their owner, if the plaintiff shows his possession down to the time when they were

[a] Sir Richard Garth, C. J., differed from the majority of the Judges and was of opinion that even in the case of *cultivated* land or *house* property, if it is shown that the plaintiff who had formerly been in undisputed possession had died or had left the country, or for other reasons was unable, or unlikely to be able, to produce actual evidence of possession, the *presumption* might legitimately be resorted to. (I. L. R., 9 Calc., 744, at p. 755). In a suit for recovery of possession of several old mouzas or villages, their Lordships of the Privy Council say: "the ordinary *presumption* would be that *possession went with the title.*" Such presumption cannot, of course, be of any avail in the presence of *clear evidence* to the contrary. (Runjeet Ram v. Goburdhun, 20 W. R., 25, at p. 30, P. C.) And as recently as 1892, in a suit for possession of *beel-bharati* or silted-up lands of a lake, their Lordships of the Privy Council referred to the same presumption, and acted upon the decision in Runjeet Ram's case. (Rajkumar v. Gobind Chunder, I. L. R., 19 Calc., 660, at pp. 674, 677). It would thus appear that there is *no difference* in *principle* as regards the application of the law of limitation between the case of lands fit for actual enjoyment in the usual modes, and the case of *jungle*, waste, swampy or unculturable lands. (See also Agency Company v. Short, 13 App. Cas., 793, at p. 799). The presumption that possession goes with the title, and the presumption of the *continuance* of the possession of the true owner, *may* be resorted to whether the suit for possession relates to waste or cultivated land. But in the case of cultivated lands or lands fit for actual enjoyment in the usual modes, the presumption should not be resorted to except under *peculiar* circumstances, as, for instance, where the plaintiff does produce *strong* evidence of possession *within* twelve years of the institution of the suit, but such evidence is *opposed* by *equally strong* evidence on the part of the defendant that the dispossession took place on an earlier date. In such a case it being extremely *difficult* to decide the question satisfactorily, the presumption may be regarded in *estimating the weight* due to the evidence on both sides. In the case of waste or unculturable lands, it being *unlikely* that the parties should be able to produce evidence of possession, the presumption may be *more readily* resorted to. See pp. 95, 99, and 103, *supra.*

Presumption of possession when *properly* available.

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so placed out of his reach, his possession is presumed to continue as long as the lands continue to be in that condition.

Onus, as to the date of a change in the condition of such land.

The true rule as to the burden of proof of the date of a *change* in the condition of such land (*e.g.*, the date of jungle land being reclaimed, or of diluviated land being reformed and rendered capable of beneficial use) is this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances, that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be *presumed* that it did so continue, and that the plaintiff's possession continued also, *until the contrary is shown*.[3]

Possession within twelve years need not be proved in suits under art. 144, Act XV.

But in suits for possession of immoveable property or any interest therein, for which there is no specific provision in Acts IX and XV—that is, suits falling under art. 145 of Act IX, and art. 144 of Act XV—it is not necessary for the plaintiff to prove that he was in possession within the period of twelve years. Even when the plaintiff was not in possession within the twelve years, he would be in time if the possession of the defendant or of some one through whom he claims was *not adverse* to the plaintiff. If the property was in the actual possession of a stakeholder, and he delivered it to the defendant within twelve years, the plaintiff, although out of actual possession for more than twelve years, is not barred by the articles mentioned above.[4] Possession by a third person on *behalf* of the true owner, *whoever he may be*, could not be *adverse*

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[3] Mahomed Ali *v.* Khajah Abdool, I. L. R., 9 Calc., 744; 12 C. L. R., 257 (F. B.) This presumption holds good even if the land is cultivated at the *date of suit*. *So far* the Full Bench has overruled the case reported in Mahomed *v.* Morrison, I. L. R., 5 Calc., 36. The case of Mohini Mohun Dass *v.* Krishto Kishore Dutt, I. L. R., 9 Calc., 802; 12 C. L. R., 337, shows that, when submerged land rises above the water, the presumption of possession may be made if it is in such a state that it is difficult to prove any positive acts of ownership over it. This case (as well as the Full Bench case) shows that, for the application of the rule, it is not necessary that land should continue to be waste at the *time of the suit*.

The land need not be waste at date of *suit*.

[4] Karan Singh *v.* Bakar Ali, I. L. R., 5 All., 1 P. C. It might have been otherwise under Act XIV of 1859, sec. 1, cl. 12, which required the suit to be brought within twelve years of the cause of action. Under the Limitation Act of 1859, the plaintiff (as pointed out in Karan Singh *v.* Bakar Ali) was subject to a *burden* of proof *heavier* than that established by the Limitation Acts of 1871 and 1877. (Per Lord Hobhouse, in Rajkumar *v.* Gobind Chunder, I. L. R., 19 Calc., 660, 674, P. C.) Suits under arts. 143 and 145 of Act IX of 1871, and corresponding suits under arts. 142 and 144 of Act XV of 1877, were all covered by sec. 1, cl. 12, Act XIV of 1859. There was then no distinction between suits for possession as *upon a dispossession*

Heavier onus under Act XIV.

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to the true owner, at least, *until* such person claimed to *change* his position (*e.g.*) to possess as *for himself*,[a] or to deliver possession to a person *other* than the true owner. So if the property was in the actual possession of the defendant's predecessor in interest under an arrangement with the plaintiff, and the arrangement was not finally put an end to until within twelve years of suit, the plaintiff is not barred by the said articles, even where the defendant is not bound by the arrangement.[b]

Proof of determination of particular estates.

In suits by remaindermen or reversioners, the date of the death of the life-tenant, or other determination of the particular estate, must be proved by the plaintiffs in order that they may show that they have commenced their suits within the prescribed period from the time when the estate falls into possession.[c]

Of possession having been permissive.

As possession is *primâ facie* adverse, if the plaintiff wants to show that the defendant's possession was not adverse but permissive, he must prove the character of the possession.[d]

Suits under arts. 142 and 144.

and *other* suits for possession. It is apprehended that Lord Hobhouse's remark, though made in a suit for possession under art. 142 of Act XV, is really applicable only to suits under art. 144. In suits for possession as upon a *dispossession* (under art. 142) the onus on the plaintiff to prove dispossession within twelve years appears to be as heavy as it was under Act XIV of 1859 or under Reg. III of 1793. (See Mohima Chunder *v.* Mohesh Chunder, I. L. R., 16 Calc., 473, P. C., and Maharajah Koower Sing *v.* Nund Lall, 8 Moo. I. A., 199).

Case of agents and stakeholders.

[a] Lyell *v.* Kennedy, 14 App. Cas., 437, at p. 456. This applies to possession by an agent *de son tort*, acting on behalf of an unascertained owner. The owner when he is ascertained may, within a reasonable time of such ascertainment, adopt and ratify the acts of *such* agent, and thus treat the latter's possession as his own possession. (*Ibid.*) Where a third person acts as the *lawful agent* of the true owner, the agent can *not*, of course, change the character of his possession by *his mere will*. (See Lecture VI).

Case of private partition.

[b] Dewan Monwar Ali *v.* Unnoda Persad, I. L. R., 5 Calc., 644. In this case the plaintiff sued, in September 1873, to establish his right to a *share* in the disputed property. The *whole* of that *particular* property had been in the exclusive possession of plaintiff's brother for more than twelve years under a family arrangement or partition. In a previous suit brought against the plaintiff and his brother by a person who had purchased, in execution, the rights and interests of plaintiff's brother, the partition was not proved against the purchaser, and on appeal by plaintiff's brother the partition was finally set aside in June 1863. The purchaser took formal possession of his purchased *share* in the *whole estate* in July 1864. It was held that the possession of the property in suit, previous to June 1863 (if not to July 1864), was not adverse to the plaintiff, and that the mere fact of plaintiff's not appealing with his brother did not affect the question. See notes under art. 144, *infra*.

[c] See Lord Denman's judgment in Nepean *v.* Doe d. Knight, 2 Mees and W., 911; art. 140, Act XV of 1877; Mylapore *v.* Yeo, I. L. R., 14 Calc., 801.

[d] Meer Usodoollah *v.* Beeby Imàman, 5 W. R., P. C., 26; Sewaji *v.* Chimna, 10 Moore's I. A., 151. Under *special* circumstances, as in

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Of disability and fraud.

When the plaintiff asks the Court to extend the period of limitation on the ground of defendant's fraud, his own minority, &c., &c., he must prove the ground of exemption from the ordinary rule.[8]

When *onus* is shifted in pre-emption suits.

In a suit to enforce the right of pre-emption, the plaintiff must give *primâ facie* evidence that the defendant took possession of his purchase within the period of limitation.[9] It will be then for the defendant to prove that he has been in possession for more than the period of limitation.

Onus under arts. 133 & 134 of Act XV.

Where the law makes a special provision in favor of certain persons, those persons, even when they are defendants, must prove that they are the persons intended to be specially protected. Thus a defendant claiming the benefit of sec. 5, Act XIV of 1859 (corresponding with arts. 133 and 134 of Acts IX of 1871 and XV of 1877), must prove that he is a purchaser for valuable consideration from a trustee or mortgagee, unless indeed where the plaintiff admits the character of the purchase.[10]

Proof of exceptional circumstances.

When the plaintiff relies on extinctive *prescription* (under sec. 34, c. 27, 3 and 4 William IV, or sec. 29, Act IX of 1871, or sec. 28, Act XV of 1877), he must prove that he has been in possession for the prescribed period; but if the defendant contends that his right is saved by reason of the plaintiff's fraud or by some other exceptional circumstance, it is for the *defendant* to prove the fraud or the other circumstance on which he relies.[1] If the position of the

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the case of co-sharers, it may be otherwise. See Shurfunnissa *v.* Kylas, 25 W. R., 53 ; Sheikh Asud *v.* Sheikh Akber, 1 C. L. R., 364. The onus in such a case may be shifted to the defendant. See Mahomed Ali *v.* Khajah Abdul, I. L. R., 9 Calc., 744, F. B. Possession of co-sharers.

[8] See sec. 14, Reg. III of 1793 ; Reg. II of 1805 ; Maharajah Rajendro Kishore *v.* Rajah Saheb Pershad, 22 W. R., 165, P. C.; see secs. 102 and 103 of Act I of 1872 ; Joy Tara *v.* Roy Chunder, 1 W. R., 137 ; Khetter *v.* Ramessur, and Kalee *v.* Sreeram, W. R., Gap No., 304, 366 ; Nilmonee *v.* Zuhurunissa, 8 W. R., 371 (minority); Sheikh Imdad *v.* Musst. Kootby, 6 W. R., P. C., 24 (defendant's fraud).

Special matter.

[9] "Whenever the plaintiff relies on *special matter* to defeat the operation of the statute, as the *fraud* of the defendant, or *disability*, such matter must be *specially pleaded*." Buswell, p. 533. "Whenever the replication sets up special matter, it should conclude with a *verification*." *Ibid.*, p. 534. As to *want* of *bonâ fides*, see p. 95, *supra*.

[9] See Ajmut Ali *v.* Kurar Ali, 8 W. R., 383, and compare W. R., Gap No., 117, Lallum *v.* Hosseinee. Act XV of 1877 makes a slight alteration as to the starting point in some cases of pre-emption.

[10] Radhanath *v.* Gisborne, 15 W. R., P. C., 24 ; Juggernath *v.* Syed Shah Mahomed, 23 W. R., 99, P. C.

[1] See the judgment of Fry, J., in Rains *v.* Baxton, 14 Ch. Div., 537, 540. In this case the plaintiff sued for an injunction in respect of a cellar of which he was in *possession*, Lect. VI, *infra*. The same rule will hold good if the plaintiff sues to *recover* possession on a *prescriptive* title.

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parties be reversed, and the party out of possession be the plaintiff, he shall, of course, have to prove that his suit is not barred by *limitation* by reason of the exceptional circumstance on which he relies.

Suits for resumption.

Under the wording of the proviso in art. 130, sched. ii, Act IX of 1871, corresponding with the proviso in cl. 14, sec. 1, Act XIV of 1859, if a suit for resumption was brought within twelve years from the time when the plaintiff's right to sue accrued, it was for the *defendant* to prove his rent-free possession from the time of the permanent settlement.*

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* Mr. Forbes *v.* Sheikh Meah Jan, 3 W. R., 69; Sham Lall *v.* Sekunder, *ibid.*, 182; Nobo Lall *v.* Maharanee Narain Koowaree, 5 W. R., 191. This *proviso* has been omitted in Act XV of 1877.

Onus of proving *title* when shifted.

In ejectment suits, where the plaintiff proves that he has been (forcibly or fraudulently) *dispossessed* by the defendant, within the period of limitation, the *latter* may be called upon to prove his own title. If he fails to do it, the plaintiff is entitled to a decree; if, on the other hand, he succeeds, the plaintiff should then, and *not till then*, be called upon to prove a better title. Jadub Nath *v.* Ramsoondur 7 W. R., 174, as explained in Khajah Enaetoolah *v.* Kishen Soonder, 8 W. R., 386, at p. 389. See also Brojo Soonder *v.* Koilash Chunder, 11 C. L. R., 133. As to when the defendant may raise the plea of *jus tertii*, see Lecture VI.

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LECTURE VI.

POSSESSION, ADVERSE POSSESSION, &c.

The physical and mental elements in the notion of "possession"—Possession how retained—Possession how lost—Trespass distinguished from possession—Symbolical or formal possession—Possession through representatives—The detention of a representative distinguished from the *possession* of a mortgagee or a tenant—The possession of zemindars and ryots, mortgagors and mortgagees—Land how possessed—Possession of part is possession of the whole—Possession of taluks and offices—Dispossession and discontinuance of possession—Adverse possession as defined by Mr. Angell—As defined by Dr. Markby—As defined by Sir J. Colvile—Knavish possession—Possession *primâ facie* adverse—Possession of derivative holders *pro tanto* adverse—Possession by another's tenant is wholly adverse to the owner—Tenant's encroachments—Change of permissive into adverse possession—Non-payment of rent by tenant—Repudiation by tenant—Possession by tenant's grantee—Trespasser's possession of demised premises—Prosunno Moyi Dasi *v.* Kalidas Roy discussed—Possession by trustee's grantee—Repudiation by trustee—Possession of a trust-estate by a trespasser—Possession by mortgagor's or mortgagee's grantee—Repudiation by mortgagor or mortgagee—Case of a co-mortgagor redeeming the mortgage—Adverse possession of right to redeem and right to foreclose—Adverse possession against both mortgagor and mortgagee—Possession of a trespasser on mortgaged premises—Possession of a *bonâ fide* purchaser in cases of concealed fraud—Possession of Hindu widows and their grantees—Repudiation of reversioner's title—Possession of a trespasser on the widow's estate—Possession of members of joint family—Possession of co-sharers—Possession how far evidence of title—The interest of disseizors transmissible—Successive trespassers under Act XV—Effect of attachments—Reinstatement after temporary dispossession.

In suits concerning specific property, specially immoveable property, the plea of limitation is very often dependent on questions relating to the possession of the property at and before the date of the suit.[1] It is therefore necessary to consider what 'possession' means and signifies.

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[1] The terms "possession," "physical possession," "dispossession," and "adverse possession" occur in the third column of Sched. II of Act XV of 1877, which fixes the time from which limitation begins to run. The first of these terms is also to be found in the Preamble, in sec. 17, and in Part IV of the Act.

Possession is a *flexible* term not necessarily meaning occupation. "Possession" (Per Romilly, M. R., in Lake *v.* Dean, 28 Beav., 607). "There is, perhaps, a flexible term. no legal conception more open to a variety of meanings than *possession*." (Lyell *v.* Kennedy, 18 Q. B. D., 796, at p. 813). According to Sir J. Stephen the English doctrine of possession is very arbitrary and unreal. (See Stokes' Anglo-Indian Codes, Vol. I, p. 55).

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Two elements in the notion of "possession."
(1). Physical.
(2). Mental.

Dr. Markby, in his Elements of Law, following the great jurist Savigny, observes* that there are two elements in the *legal* conception of possession—a physical element, and a mental element. In order to constitute possession in a *legal* sense there must exist not only the *physical power*[a]

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* These observations are *primarily* applicable to the possession of some corporeal or tangible existing thing. (See Markby's Elements of Law, 3rd Ed., Chapter IX). They are, secondarily, applicable to servitudes or easements. But to apply the legal consequences of possession to the exercise of *all* rights, without discrimination, would produce the greatest confusion. (*Ibid.*, secs. 394, 395).

[a] The physical element is not necessarily connected with any bodily contact with the whole or any part of the subject, but it implies the physical power or possibility of dealing with the subject immediately, and of excluding any foreign agency over it. (See Sir Erskine Perry's translation of Savigny on Possession; Collett on Torts, sec. 162; Markby, sec. 354).

Detention, not possession.

Legal or *Juridical* "possession," should be distinguished from the mere *physical* "occupation," or "detention," or "custody" of a corporeal thing.

Possession of zemindaries.

A zemindar, or an intermediate tenure-holder who receives rents from tenants occupying the whole of the land, may have no power to deal with any part of the *land*, in any way he likes; but he has power to deal with his zemindary or tenure, and the right to collect the rents, in any manner he likes. (See p. 120, *infra*). The Roman lawyers extended the idea of *possession* to abstractions; to such *incorporeal* things as servitudes. (Markby, sec. 391). Savigny considers that the conception of the enjoyment of an incorporeal thing is *analogous* in all respects to the conception of the possession of a corporeal thing; of which conception it is an extension. Where the subject of possession is incorporeal, the possession is called "*quasi*-possession," as opposed to "possession" *properly* so called. In order that there may be *quasi*-possession of an incorporeal right *in rem*, it is not necessary that the right should be *actually* exercised. The physical *possibility* of exercising or enjoying the right, coupled with the *determination* to exercise and enjoy it on one's own behalf, constitutes *quasi*-possession. (Markby, sec. 577).

Quasi-possession of incorporeal rights.

Possession of such rights in Indian law.

It may be that the term "possession" in its *strict* philosophical meaning is inapplicable to *incorporeal* property. But the Indian Legislature has in repeated instances used the term "possession" as applicable to easements, fisheries, &c., without regard to the *incorporeal* nature of such hereditaments. (See the Preamble to Act XV of 1877, Part IV of the same Act, and the Judgment of Pigot, J., in Fadu v. Gourmohun, I. L. R., 19 Calc., 544, at p. 555). English lawyers speak of the *possession* of an *advowson*, and treat a person collecting *tolls* as in legal *possession* of the *right* to take tolls. (Markby, sec. 394). But it would be going too far to speak of a person collecting the interest of a debt as in *possession* of a debt. Pigot, J., has shewn that in the language of the Indian Legislature, the owner of an *incorporeal* fishery right may be "dispossessed" of such right. But Petheram, C. J., is of opinion that an incorporeal right "*must always* remain in the *possession* of its owner, though he may for any reason be prevented from *exercising* it." (I. L. R., 19 Calc., pp. 547, 548). The terms "user," "enjoyment," and "*quasi*-possession" are *ordinarily* used by lawyers when speaking of the possession of *incorporeal* hereditaments. But if *right* and *possession* are not the same thing, it can hardly be accurate to say that an incorporeal right *must always* remain in the *possession* of its owner.

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(or rather the *possibility*) to deal with the thing as we like, and to exclude others, but also the *determination* to exercise that physical power or control on our *own* behalf. When possession has been once received, it is not necessary that the physical power should be retained at every moment of time; the possession will continue if we can reproduce that physical power at any moment we wish it; and it will cease when we cannot do so.[4] It is also not necessary that the determination or intention to possess should be constantly present to our minds; it will be sufficient for the purpose of retaining possession that we should, if we adverted to it, keep to that determination. According to this notion of possession it follows that, when either of the two elements is wanting, there is no possession.[5]

Possession how retained.

Possession how lost.

When we have lost the *physical control* over the thing, we have lost possession,[6] whether we *know* it or

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In a suit for the recovery of (*possession* of) a wife (art. 34, Act XV of 1877), the wife, considered as the subject or object of rights, is a "thing."

[4] It is not necessary, in order to prove possession, to prove an actual bodily continuous possession—*Per* Sir Barnes Peacock, C. J., quoting Domat, in Watson *v.* Government, 3 W. R., 73, 80.

[5] The framers of the Indian Penal Code proposed the following definition of "possession:" "Corporeal property is in a person's possession when he has such *power* over it that he can *exclude* others from it, and *intends* to exercise, if necessary, that power on behalf of *himself* or of some person of whom he is guardian, or for whom he is trustee." When possession has been taken, "such power and intention continue until they are respectively destroyed by adverse power or contrary intention." "One person is deemed to have power over corporeal property in the *custody* of another when the latter is obedient to the orders of the former respecting that property." (See Stokes' Anglo-Indian Codes, Vol. I, pp. 56, 57).

Proposed definition of possession by framers of I. P. C.

[6] But it has been held that land, of which *A* is (rightfully or wrongfully) in possession at the time of its diluvion, continues to be in *A's* possession, although it is wholly *out of his reach* until it is reformed on the same site. (Mahomed Ali *v.* Khajah Abdool, I. L. R., 9 Calc., 744; and Kalichurn *v.* The Secretary of State, I. L. R., 6 Calc., 725. See p. 107, *supra*). Such possession has been called *constructive* possession. It is *possession*, because under the circumstances it is *deemed* to be such in law. It may be also observed that *for purposes of limitation* our possession does *not* cease or discontinue until *another* person takes posscssion of the property. (See pp. 98, 107, *supra*, and p. 126, *infra*). Even where the true owner voluntarily *abandons* his possession, *limitation* does not run against him until some other person takes possession of the property. Where possession is voluntarily *abandoned* by an *intruder* (if such abandonment takes place *before* the title of the true owner is extinguished by limitation), there being then *no person* against whom an action of ejectment may be brought, the true owner is restored to possession from the date of such abandonment. (Agency Company *v.* Short, 13 App. Cas., 793, and p. 107, *supra*). Possession in law follows the *right* to possess as soon as the obstruction caused by the intrusion is removed. The going out of the intruder makes it again *physically possible* for the true owner

Constructive possession of diluviated lands.

Abandonment of possession by intruder.

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not.[7] But as one of the legal consequences of possession is the right to use force in defending possession, a *trespasser* cannot, by the very act of trespass, *immediately* and *without acquiescence* on the part of the owner, or the party in possession, become *possessed* of the land or house upon which he has trespassed.[8] If, however, he *determines to hold* the property *on his own behalf*, and is *allowed to continue* on the land or house, and the owner or party in possession makes no effort to remove him, he does gain *possession*,[9] the law no longer allowing the owner or party in possession (to reproduce his physical control and) eject the trespasser by force.

Trespass distinguished from possession.

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to deal with the property as he likes. It is assumed, of course, that the true owner did not abandon his *intention* to possess. The lost *physical* element only is now added to the existing *mental* element. The true owner is now in the same position in all respects as he was, *before* the intrusion took place. The law does not require him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. It is not necessary that he should make any entry with the intention of repossessing himself of the property. (*Ibid.*)

True owner when restored to possession.

[7] Markby, sec. 365; Rains v. Buxton, 14 Ch. Div., 537. "*Ignorance* of the owner will not prevent the accrual of a title by prescription." Secretary of State v. Vira Rayan, I. L. R., 9 Mad., 175, at p. 183. Knowledge may be *presumed* from an open and notorious act of taking possession. (See Angell, sec. 392). *Knowledge* of the intrusion *was necessary* under the Roman law. But such a rule is clearly in conflict with the notion of possession as it has been developed above. (Markby, *ibid.*)

Knowledge of intrusion, unnecessary.

[8] *Per* Lord Denman in Browne v. Dawson, 12 AD. E., 624, at p. 629. But when a person *entitled* to possession enters in the assertion of that possession, the law *immediately* vests the actual possession in that person. (Lows v. Telford, 1 App. Cas., 414, 426). Of two persons entering simultaneously, the English law assigns possession to him that has the right by a rule identical in substance with that of the Hindu law on the same subject. (Lillu v. Annaji, I. L. R., 5 Bom., 387, 390). If there are two persons in a field each asserting his right to it, the person who has the title is in actual possession, and the other person is a mere trespasser. (Jones v. Chapman, 2 Ex., at p. 821). "Where possession in *fact* is undetermined, possession in *law* follows the *right* to possess." (Pollock on Possession, p. 24).

True owner's *entry*.

If the legal owner commits a breach of the peace in attempting to take possession, that affords a ground for a criminal prosecution, and if the attempt is *successful*, for a summary suit for possession under sec. 9 of the Specific Relief Act, I of 1877. But an unlawful act in entering does not make the owner a trespasser *ab initio*; the law will still annex the right to the possession. (Lillu v. Annaji, I. L. R., 5 Bom., at p. 391). As to the *fact* of *possession* and its *legal consequences*, it makes no difference whether it has been taken by the legal owner *forcibly or not*. (Lows v. Telford, 1 App. Cas., 414, at p. 426).

[9] A trespass by a party struggling for possession must be acquiesced in by the party in possession, before the former can be said to be "in possession," and the latter to be "out of possession." (*In re*

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When our *intention* or *determination* to possess is expressly abandoned, or presumed to have been abandoned, our possession is equally lost. In the absence of an express declaration of the party in possession, the intention to abandon, as well as the *date* of such determination, must be inferred from the surrounding circumstances. In the absence of all evidence to the contrary, it would be usual to take the date of the first indication of an intention to abandon (*e.g.*, of the first omission to cultivate the land in question) as the date of that determination, leaving it to those interested to establish any other date, if they could. (Markby, sec. 370). Intention to abandon.

Whether the thing so abandoned is *possessed* by *another* person or not, depends on the existence or otherwise of both

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Mohesh Chunder Khan, I. L. R., 4 Calc., 417. See also the English cases referred to in Sreehurry *v.* J. Hills, 6 W. R., Civ. Ref., 21, at p. 23, and Dadabhai *v.* The Sub-Collector, 7 Bom., 82). A casual act of trespass would not have the effect of disturbing possession. (*Per* Garth, C. J., in Kalichurn *v.* The Secretary of State, 8 C. L. R., 90, 98 ; S. C. I. L. R., 6 Calc., 725, 735). The mere physical occupation of land by a trespasser is not juridical possession—*Per* Melvill, J., in Dadabhai *v.* The Sub-Collector, 7 Bom., 82. See also 6 Mad., 13, App., Pro., 9th Jan. 1871. The term "possession" in sec. 9 of the Specific Relief Act and the expression "actual possession" in the Criminal Procedure Code, does not include the occupancy or detention of a mere trespasser. Where a trespasser is warned off the land the instant he enters upon it, where his occupation is disputed or not acquiesced in, he cannot have what the *law* understands by *possession*. *Ibid.* Trespass acquiesced in is possession.

But compare Ambler *v.* Pushong, I. L. R., 11 Calc., 365. In this case Ambler's occupation of the hill in dispute for two or three days *without acquiescence* on the part of Pushong, who had been in possession for the preceding three or four weeks, was treated as *actual possession* within the meaning of sec. 145 of the Criminal Procedure Code of 1882. It was found by the lower Court that Ambler was in possession when Pushong first entered the hill. This fact might have been taken into consideration and it might have been held that Ambler was remitted to his old possession. But the learned Judges of the High Court do not seem to have considered the fact of anterior undisputed possession as material for the determination of the question before them. The expression "actual possession" is ambiguous. It may mean *physical* detention or occupation—see Siva Subramanya *v.* Secretary of State, I. L. R., 9 Mad., 285, at p. 303—or it may mean real *juridical* possession (see 7 Bom., 82). Cf. Ambler *v.* Pushong.

A mere succession of independent trespasses, if not of such a character that an *intention* to assert a right as owner may be inferred from it, does not amount to such possession or enjoyment as is required by the law of limitation and prescription. (Secretary of State *v.* Virarayan, I. L. R., 9 Mad., 175, at p. 183). When the successive acts are done by an *ascertained* person *continuously, and under a claim of right*, they may amount to *possession*. (Parbutty *v.* Mudho, I. L. R., 3 Calc., 276, 279 ; Luchmiput *v.* Sadaulla, I. L. R., 9 Calc., 698, 702). Occasional intrusions are *not continuous* like possession. (Anandrav *v.* Shankar, I. L. R., 7 Bom., 323, 327). Occasional or successive intrusions.

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Symbolical or formal possession.

the physical control and the intention to possess in that other person. But where positive law, in cases of certain transfers, prescribes a particular form or mode of delivering possession (as in sec. 29, Act XI of 1859; secs. 224, 264, Act VIII of 1859; secs. 264, 319, Act X of 1877, and Act XIV of 1882), such formal delivery, as between the parties concerned, must be *deemed* equivalent to actual possession, even when the former possessor retains his control over the property.[10] Such possession is sometimes spoken of as "symbolical or formal possession."

Possession in a legal sense is the determination to exercise physical control over a thing on one's own behalf,

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[10] Notwithstanding the continuance of both the physical and mental elements, the former possessor loses his possession, and the purchaser or the decree-holder obtains possession. This, however, is *constructive* possession. It is possession because the *law* looks upon it as such. See Juggobandhu *v.* Ram Chandra, I. L. R., 5 Calc., 584; (S. C.) 5 C. L. R., 548, F. B.; Mozuffer *v.* Abdus, 6 C. L. R., 539; and Gunga Govindo Mundul *v.* Bhoopal Chunder, 19 W. R., 101, P. C.; Lokessur *v.* Purgun, I. L. R., 7 Calc., 418; Runjit *v.* Bunwari, I. L. R., 10 Calc., 993; Shamachurn *v.* Madhab Chunder, I. L. R., 11 Calc., 93; Gopal Dass *v.* Than Sing, I. L. R., 4 All., 184; Venkatra Manna *v.* Viramma, I. L. R., 10 Mad., 17, 19. In Shaikh Mungle *v.* Durga Narain, 25 W. R., Cr. R., 74, and in Raja Babu *v.* Muddun Mohun, I. L. R., 14 Calc., 169, 173, the *formal* delivery of possession by a Court peon to one of the parties to a proceeding under (sec. 530 or) sec. 145 of the Criminal Procedure Code of (1872 or) 1882, although *res inter alios*, was treated as *some* evidence of possession. If the former possessor continues to hold actual possession, the purchaser or the decree-holder will have a fresh start from the date of the formal delivery of possession. *Strangers*, however, are not affected by such formal delivery (Doyanidhi *v.* Kalai Panda, 11 C. L. R., 395), except, perhaps, in the manner stated in the last sentence of the last paragraph. Formal possession against *A*, does not affect *permanent* tenants under *A*. (I. L. R., 18 Calc., 520).

A fresh start, against whom.

A decree for recovery of possession of land and the execution of such decree, although only symbolical possession is delivered by the executing Court, put an end altogether to limitation. (Gunga Gobind Mundul *v.* Bhoopal Chunder, 19 W. R., 101, P. C.) If the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits from the tenants, the plaintiff would have twelve years from such dispossession to bring another suit. (Juggobundhu *v.* Ramcharan, I. L. R., 5 Calc., 584, F. B.) The *formal* delivery of possession of immoveable property under sec. 263 or sec. 318 of Act XIV of 1882 is *equivalent* to a complete *transfer of actual possession*. In one case Jackson and Macdonell, JJ., were of opinion that *symbolical* possession of property in the *occupation* of the defendant or judgment-debtor was not sufficient to give the plaintiff a fresh start. (Shoteenath *v.* Obhoy, I. L. R., 5 Calc., 331). But in a later case, Garth, C. J., and MacDonell, J., held that putting the plaintiff in possession of *such* property by proclamation and beat of drum under sec. 264 (or sec. 319), instead of putting him in actual possession under sec. 263 (or sec. 318), was sufficient for all purposes of limitation. Any formal mistake made by the officer of the Court in the *mode* of delivery could not prejudice the plaintiff. (Lokessur *v.* Purgun, I. L. R., 7 Calc., 418).

Mistake in the *mode* of delivery.

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coupled with the capacity of doing so; and is, therefore, of necessity *exclusive*. Only *one* person can be in *possession* of the same thing at the same time.[11]

Possession is exclusive.

The possession of a thing through our servant, bailiff, or other representative is our possession, not fictitiously or constructively, but really and directly; for we may at any moment, supposing the representative is obedient to our commands, resume our physical control over the thing. The so called possession of the representative is "detention," not "possession" in a legal or juridical sense. The conditions necessary to constitute possession through a representative are: (*a*) that the representative must have the physical control over the thing; (*b*) that the representative must determine that this physical control shall be exercised on behalf of the principal; and (*c*) that the principal must assent to its being so exercised. If the representative changes his mind and determines to hold the property on behalf of himself, strictly speaking, the possession of the principal is gone. But there the law interferes in favor of the principal, and holds that his possession continues, at least, until the denial of his right is brought to his knowledge.[1]

Possession through representatives.

Character of such possession, when changed.

The apparent possession of the guardian of an infant, and the committee of a lunatic, is legally the possession of the infant and the lunatic; the authority (*auctoritas*) of the representative in these cases supplies the mental deficiency of the infant and the lunatic.[2]

Guardian and ward.

The bare *detention* of a representative on behalf of the principal should, however, be distinguished from the *possession* of a mortgagee, a pawnee, and a tenant. The possession by these persons of the property of another, although

The *detention* of a representative distinguished from the *possession* of a mortgagee or a tenant.

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[11] Markby, 3rd Ed., sec. 397. See note 1, p. 128, *infra*.

[1] Markby, secs. 372, 374; see also the definiton of possession proposed by the framers of the Indian Penal Code, p. 115, *supra*. Where a person has entered into possession and has been left in possession in the first instance in accordance with a contract, he cannot change the character of the possession by his mere will. *Per* West, J., in Dadoba *v.* Krishna, I. L. R., 7 Bom., 34. See the cases cited in notes 6, 7, 8, pp. 140, 141, *infra*. Possession of an agent is possession of the principal, and the principal may acquire a title to real estate by receiving the rents for twelve years through an agent, although that agent is the person really entitled to the estate. See Williams *v.* Potts, L. R., 12 Eq., 149. As to the possession of agents *de son tort*, see Lyell *v.* Kennedy, 14 App. Cas., 437; p. 110, *supra*; and Lecture X.

[2] According to the definition referred to in the preceding note, the legal possession would appear to be in the guardian. The truth is that, between the guardian and the ward, who are in a manner identified, there is one complete person who is in complete possession. See Markby, sec. 376.

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derivative, is, strictly speaking, their own possession; though generally, as against *third* persons, the possession of the derivative holder may be *deemed* to be the possession of the original owner.[3] The proprietor is also *actually* in possession of the *interest* which he still has in the property.[4] The derivative holder, as such, does not *intend* to hold the property as *full* owner, and his possession cannot be *entirely* adverse to the proprietor.

The possession of zemindars and ryots, mortgagors and mortgagees.

The zemindar, intermediate tenants, and occupying ryots are all, in their degree, respectively in possession of the interests which they severally enjoy[5]; and so long as the original relation between the lessor and the person immediately holding from him subsists, the possession of the latter is also, for some purposes, the possession of the former.[6] Where a cultivator of the soil gets a share of the

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Vendee's possession entirely adverse.

[3] The *title* of a vendee is *derivative*, but he *enters and holds* entirely for himself, and not at all for the vendor. (Buswell, p. 362).

Possession of zemindaries.

The word "possession" in the Criminal Procedure Codes of 1861, 1872, and 1882 has been interpreted to include possession *by or through* an immediate *tenant* or an *usufructuary*. The bodily or physical possession of such person is for most purposes treated as the possession of him by whose permission he holds the land. Sutherland *v.* Crowdy, 18 W. R., 11, 13, Cr. Rul. The zemindar's possession of the *right to collect rents* from the tenants in possession, is *actual* possession of *tangible* property. (See Sarbanand *v.* Pran, I. L. R., 15 Calc., 527, and Ramasami *v.* Danakoti, I. L. R., 12 Mad., 88).

Dispossession of derivative holders.

If the mortgagee or lessee is *dispossessed* by a third person, the question, whether the *owner* also is constructively dispossessed, is more difficult. There are conflicting rulings on the point: see Ammu *v.* Ram Krishna, I. L. R., 2 Mad., 226, and Vithoba *v.* Gungaram, 12 Bom., 180; Prosonnomoyi *v.* Kalidas, 9 C. L. R., 347, and Krishna *v.* Hari, 12 C. L. R., 19; I. L. R., 9 Calc., 367. It may be remarked that possession is an incident of ownership, that what applies to possession does not necessarily apply to dispossession, and that, although the possession of a leaseholder may be deemed to be the possession of the lessor, the dispossession of a leaseholder may not, for purposes of limitation, be *deemed* to be the dispossession of the lessor.

[4] The mortgagor is in *actual* possession of *his interest* in the mortgaged property, as the mortgagee is in actual possession of *his* interest. See the judgment of Pearson, J., in Jogeshwar *v.* Jawahir, I. L. R., 1 All., 311, at p. 313.

[5] See the remarks of Mr. Justice Jackson in Harak Narain Singh *v.* Luchmi Bux Roy, 5 C. L. R., 287; Shome's Law Reporter, Vol. III, Cr., 8, 9. According to English law the grantee of land for a term of years, however long, has no *estate* or *interest* in the land, and can therefore have no *possession* of the land. (Markby's Elements of Law, sec. 388).

[6] But if the interest of the tenant is heritable, transferable, and perpetual, if the owner of the estate reserves no rights except that of receiving a rent, the possession of the tenant is not (even according to the principles of English law) the possession of his landlord, but possession on his own behalf—Bejoy *v.* Kally, I. L. R., 4 Calc., 327, 328. As against *third* persons, however, for purposes of limitation, the owner is deemed to be in possession of the estate by his tenant.

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crops in lieu of wages, or where his tenure is in the nature of a partnership in which the landlord participates in the crops with him, the landlord may be said to be in possession of the *soil*[7]; but where the tenant has an interest *in rem* in the land which enables him to exclude others, including the zemindar or talukdar, from the land, he (and not the zemindar or talukdar) is in possession of the soil.[8] Nevertheless, the zemindar or talukdar may be in possession of his *zemindary* or *taluki* interest by receipt of rent from the tenants and ryots. So again, the mortgagor, or the purchaser of his equity of redemption, may be in possession of his interest, although the land itself is in the possession of the mortgagee.[9] But an undivided share in a *puttidari* estate, or an equity of redemption, is incapable of *physical* possession.[10] Possession of landlords and tenants.

So long as the relation of landlord and tenant, or mortgagor and mortgagee, continues, the owner is in possession of his interest in the land, and the tenant or mortgagee's possession of the land is subject to the rights of the owner. The derivative holder claims one sort of possession and the owner a different sort of possession,[1] or, using the word "thing" as including a right, the derivative holder claims possession of one thing and the owner claims possession of another thing.

For purposes of limitation and prescription "land" may, generally speaking, be said to have been possessed and occupied[2]— Land how possessed.

(*a*). Where it has been usually cultivated or improved;

(*b*). Where it has been protected by a substantial enclosure;

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[7] See Venkatachalam *v.* Andiappan, I. L. R., 2 Mad., 232.

[8] See Thakoee *v.* Smoult, Fulton's Reports, Vol. I, p. 136, where Sir L. Peel, C. J., held that a talukdar cannot bring trespass in respect of land in the occupation of his ryots. Cf. note 3, p. 133, *infra*.

[9] Jageshwar Sing *v.* Jwahir Sing, I. L. R., 1 All., 311, 313, F. B.

[10] See notes under art. 10, Sched. II, Act XV, in the Appendix.

[1] See Umr-un-nissa *v.* Mahammed Yarkhan, I. L. R., 3 All., 24, F. B. The *same* sort of possession (full proprietary, or otherwise) must be claimed by the contending parties before the possession of one becomes adverse to the other.

[2] Sec. 23 of Sir J. F. J. Stephen's Limitation Bill, No. 3 of 1870. *Cf.* New York Revised Statutes, Vol. II, Part 3, Chap. 4, Tit. 2, secs. 10-12. It should be observed that, when there is an *intention* to hold a thing as *owner*, it is not necessary that it should be enjoyed in any *particular* way, but it is sufficient that *some overt act* is done *upon* the thing or *in relation* to it in the execution of such intention. (Sivasubra *v.* Secretary of State, I. L. R., 9 Mad., 285, 303). This decision of the High Court has been upheld by the Privy Council. (See L. R., 18 Ind. App., 149; I. L. R., 15 Mad., 101, P. C.)

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(*c*). Where buildings have been erected upon it;

(*d*). Where it has been used for the supply of fuel, timber, minerals, wax, honey, lac, juice of trees, and the like, or for the purposes of husbandry, or otherwise for the benefit of the occupants.

Where the land is not susceptible of enjoyment in the usual modes.

Such other acts of ownership exercised over land, as are natural under the existing condition of the land, are evidence of possession of the land, if it is not susceptible of a more strict or definite possession.[3] Thus, in the case of a *baor* or water channel lying between two estates, rights of fishing exercised in and over the water, or working minerals below the surface of the soil, would be *primâ facie* evidence of possession and ownership, unless it could be shown that such acts were referrable to a right of easement or some other right or title.[4] And in the case of mountain or wild lands, the enjoyment of *any right* of ownership over the soil, whether it be the cutting of timber or of turf or the gathering of produce, is *primâ facie* proof of *possession of the soil*. In principle, the act done is one of *ownership* or evidence of *easement*, according as the person doing it *asserts* general ownership, or a particular right *in re alieno solo*. Enjoyment accompanied with an *assertion of full ownership* is *possession*. Enjoyment in the assertion of a fragmentary right in another's property is *quasi-possession*.[5] Exercising the right of grazing cattle, cutting timber, and collecting mountain-produce in the assertion of a persistent claim of right to a tract of wild land, even when such enjoyment is not *exclusive*, may amount to *proprietary* possession of the *land*. It is, no doubt, possible that other persons exercising similar rights in the assertion of rights of *easement* may be in *quasi*-possession of such *incorporeal* rights over the same land. (See *Secretary of State* v. *Nellakutti*, I. L. R., 15 Mad., 101, P. C.)

Act of *ownership*, and evidence of *easement*, how distinguished.

Possession of appurtenances.

Where lands which are not capable of actual occupation or enjoyment in the usual modes (such as a newly-formed accretion, or a *khal*) appertain to lands which are so occupied or enjoyed, the possession of the former follows that of the latter, unless and until *another* person takes adverse possession of the former.[6]

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[3] See Mahomed Ali *v.* Khajah Abdul, 12 C. L. R., 260; I. L. R., 9 Calc., 744; and Angell, sec. 398.

[4] Mohini Mohun Das *v.* Kristo Kishore Dutt, 12 C. L. R., 337, 339; I. L. R., 9 Calc., 802.

[5] Sivasubramanya *v.* Secretary of State, I. L. R., 9 Mad., 285, at pp. 305, 306.

[6] See Sunnud Ali *v.* Musst. Karim-un-nissa, 9 W. R., 124; Mahomed Ali *v.* Khajah Abdul, I. L. R., 9 Calc., 744; 12 C. L. R., 257, 266.

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Generally speaking, possession of part is, in law, possession of the whole, if the whole is otherwise vacant. This *constructive* possession is an incident of *ownership*, and results from title. It is in no way applicable to a case where the occupant defends himself avowedly and exclusively on the ground of his own wrong, that is on the ground of his possession *only*, and without claiming any title. Possession of land, by a party not claiming title, is confined to the part *actually* occupied by him.[6a]

Possession of *part* is possession of the *whole*.

In the case of wrongful possession of a part by a stranger, his possession does not extend to the whole, unless it is accompanied by a *definite claim of title* to the whole. It has been held in America that the doctrine of constructive adverse possession of lands held under color of title does not apply to *very large* tracts of lands.[6b]

Constructive adverse possession of large tracts.

Their Lordships of the Privy Council have held that when a tract of land with a *defined* boundary has been throughout *claimed as owner*, and acts of ownership have been done upon various *portions* of it, such acts of enjoyment may be accepted as evidence of the possession of the whole. This rule of evidence is not applicable to a question of *undefined* and disputed boundary.[7]

Constructive or ideal possession.

If a large field is surrounded by hedges, acts done in one part of it would be evidence of the possession of the whole. If the boundaries of a tract of land throughout claimed by *A* as owner, are well defined, and *A's* actual possession of a *part* of such tract is proved, the Court may presume that *A* had at least an *ideal* or constructive possession of the other parts of the same tract. If the question is whether

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[6a] Miller *v.* Shaw. A person who enters under a claim or color of title is regarded with more favor than a mere naked disseizor. If one has already got constructive possession, by occupying a part under color of title, another cannot acquire a constructive possession to the same extent, in the same manner. Though the latter enters on part with color of title to the whole, his possession will be confined in extent to the part which he *actually* occupies. *Constructive* adverse possession ceases as to uninclosed land, when the *true owner* enters upon any part of his land. Angell, secs. 394, 395, 401 ; Buswell, pp. 350, 354, 356.

Possessions not allowed to *conflict*. See p. 128, *infra*.

[6b] It would be mischievous to treat the actual possession of one acre of land with a claim of title to a thousand acres of uncultivated land (though within defined boundaries) as constructive adverse possession of the whole. See Buswell, pp. 357, 358 ; Angell, sec. 403.

[7] Clarke *v.* Elphinstone, 6 App. Cas., 164 ; Sivasubra *v.* Secretary of State, I. L. R., 9 Mad., 285, at p. 305.

It has been held by Mr. Justice Louis Jackson that possession of a part of a large extent of territory may (under certain circumstances) amount to *constructive* possession of the whole, so as to be an answer to the plea of limitation, but that such possession cannot be treated as *actual* possession within the meaning of sec. 530 of the Criminal Procedure Code of 1872. Bijoy *v.* Bengal Coal Co., 23 W. R., 45, Cr. Rul.

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Not in case of disputed boundaries.

a particular plot of land is included within estate *X*, or in the conterminous estate *Y*, if in short there is a boundary dispute, acts of possession over other parts of estate *X* or over other parts of estate *Y* cannot possibly be any evidence as to the possession of the disputed plot. But if the boundaries between the two estates has been established by agreement of parties or otherwise, and the disputed plot is within the boundaries of one of the two estates, acts of possession in other parts of that estate would be evidence of possession of the disputed plot. (*Clarke* v. *Elphinstone*, 6 App. Cases, 164).

Where the *whole* is a *unum quid*.

If, however, the title to the disputed plot is *separate*, acts of ownership in *other* parts of the tract could *not* possibly be evidence of possession under such separate title. If a tract of land or water can be taken to be a *unum quid* (a connected and unbroken entirety, exercise of dominion ever certain parts in accordance with a *claim of title to the whole* may be evidence of possession of the whole. (*Neill* v. *Duke of Devonshire*, 8 App. Cas., 135, at pp. 151, 166). The mere fact that the plaintiff divides the tracts claimed into three sections does not affect the applicability of the rule if he claims all the three sections under one and the same title. (*Secretary of State* v. *Nellakuti*, I. L. R., 15 Mad., 101, P. C.)

Where it is not.

Even where the whole tract is *not* claimed under one and the same title, even where it cannot be taken to be a *unum quid*, if there is evidence of acts of ownership on the disputed plot itself, such evidence may be *confirmed* by evidence of acts of ownership on other, but contiguous portions of the tract. (*Neill* v. *Duke*, 8 App. Cas., at p. 152). Where, in trespass, the plaintiff claimed the *whole* bed of a river flowing between his land and the defendant's, the defendant contending that each was entitled *ad medium filum aquæ*, it was held that evidence of acts of ownership exercised by the plaintiff upon the bed and banks of the river on the *defendant's* side, but lower down the stream and where it flowed between the plaintiff's land and the land of a *third* riparian proprietor adjoining the defendant's land, was admissible as evidence not only of plaintiff's possession but also of his right to the disputed portion of the bed—the acts given in evidence being inconsistent with the presumption on which the defendant, as a riparian proprietor, relied. (*Jones* v. *Williams*, 2 M. & W., 326; *Neill* v. *Duke*, 8 App. Cas., at p. 171; *Clarke* v. *Elphinstone*, 6 App. Cas., at p. 170).

Possession of taluks and other immoveables.

A taluk or an intermediate tenure is said to have been possessed when the rents payable by the under-tenants have been usually received. Lands and houses in the possession of temporary tenants are (as regards third persons) deemed to be in the possession of the landlord.

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An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.[8] Possession of offices.

Before Act IX of 1871 came into operation, in claims to the possession of land, the accruing of the cause of action was the point from which limitation, generally, commenced to run, and to ascertain when the cause of action arose it was often necessary to consider when the defendant's possession became adverse to the plaintiff. The law has now, to a large extent, definitely fixed the point from which the period of limitation is to run. The term "adverse possession," however, occurred in arts. 123 and 145 of Act IX of 1871, and still occurs in arts. 124 and 144 of Act XV of 1877. And the expression "plaintiff's dispossession and discontinuance of possession," which appears in some other articles, do not include cases where no *other person* is in possession, or where the defendant's so called possession is on behalf of the plaintiff.[9] Accrual of cause of action.

The words "dispossession" and "discontinuance of possession" (in art. 143, Act IX of 1871, and art. 142, Act XV of 1877) are borrowed[10] from sec. 3 of the 3rd and 4th Will. IV, c. 27. In an English case,[1] Fry, J., said: "In my view the difference between dispossession and the discontinuance of possession might be expressed in this way, —the one is where a person comes in and drives out the others from possession, the other case is when the person in possession goes out and is followed into possession by others." Where a person in wrongful possession goes out, but is not followed into possession by *others*, the true owner's possession is revived, and limitation which commenced to run against him ceases to do so. For the *continuance* of the running of time, there must always be some one against whom the plaintiff can bring an action of ejectment. (See *Agency Co.* v. *Short*, 13 App. Cas., 793). Dispossession and discontinuance of possession.

In *Rains* v. *Buxton*,[1] it was held that where *A* was in constructive possession of a cellar under his ground, and *B* subsequently took actual possession of it, *A* must be deemed to have been dispossessed or to have discontinued the possession, though he was ignorant of the existence of the Knowledge, not necessary.

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[8] Schedule II, art. 124, Act XV of 1877, and art. 123, Act IX of 1871. As to *other* offices, see I. L. R., 19 Calc., 776.

[9] Govinda Lal Seal *v.* Debendra Nath Mallik, I. L. R., 5 Calc., 679; (S. C.) 5 C. L. R., 527, 531; (on appeal) I. L. R., 6 Calc., 311; (S. C.) 7 C. L. R., 181. See p. 127, *infra*.

[10] Govindlal *v.* Debendra, I. L. R., 6 Calc., 311; (S. C.) 7 C. L. R., 181.

[1] Rains *v.* Buxton, 14 Ch. Div., 537.

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cellar or of its adverse occupation by *B*. An actual driving out of possession, or an actual going out of possession, is not necessary where another person takes actual possession of the property.

Possession and dispossession of diluviated lands.

In *Kali Charan Sahu* v. *The Secretary of State*,[1] Mr. Justice White held that *dispossession* occurs where the property is taken actual possession of, or is capable of being taken such possession of, by another, and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation and actual possession. Garth, C. J., in the same case held that possession under a *claim of right*, whether wrongful or not, if existing at the date of diluvion, continues so long as the property is under water.[2] Mere cessation of possession does not amount to *discontinuance* within the meaning of the act, unless it is followed by the possession of *another* person in whose favor time would run.[4] The term is not applicable where the possession of this other person is only permissive and on behalf of the owner.[5] A person is not dispossessed unless ejectment will lie at his suit against another person.[6]

The Statute 3 and 4 Will. IV, Chap. 27, has, it is said, done away with the doctrine of non-adverse possession in England.[6a] In India also, it seems clear that the framers of the Limitation Acts of 1871 and 1877 "were minded to get rid of

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[1] 8 C. L. R., 90, 101; I. L. R., 6 Calc., 725. See p. 116, *supra*.

Even a *dishonest claim* of right is sufficient.

[2] See 8 C. L. R., 90, 98. See also Mahomed Ali *v.* Khajah Abdul, I. L. R., 9 Calc., 744, F. B. A mere trespass *without* a claim of right does not amount to an *ouster* of the party rightfully in possession. But it is not necessary that the claim should be believed to be a *just* claim. A dishonest or *knavish* possession does not prevent the possessor from availing himself of the provisions of the Limitation Acts, provided the case does not fall under the exception as to "concealed fraud." See Angell, sec. 389, note; Kowar Poresh *v.* Watson & Co., 5 W. R., 283; and sec. 18, Act XV of 1877, and Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175, at p. 183. As to the Roman law on the subject, see pp. 23 and 40, *supra*, and pp. 128, 130, *infra*.

[4] Lord St. Leonard's Handy Book of Property Law, p. 214; Banning, 98; Kalichurn *v.* The Secretary of State, I. L. R., 6 Calc., 725, *per* White, J.; Pandurang *v.* Balkrishna, 6 Bom., 125. See also Luchmiput Sing *v.* Sadaulla, I. L. R., 9 Calc., 698, 702; and note 2, p. 98, *supra*.

[5] Govinda *v.* Debendra, 7 C. L. R., 181; I. L. R., 6 Calc., 311. The term *discontinuance* cannot be construed to include an active putting into possession by the owner of some dependent by way of charity. Where the owner in the exercise of his own proprietary right, *permits* some person to occupy his land or to receive his rents, the possession of the owner is *not discontinued*, because under such circumstances, the possession of the occupier is the possession of the owner. (*Ibid.*, pp. 314, 315).

[6] Darby and Bosanquet, p. 218.

[6a] *Per* Lord Denman, in Nepean *v.* Knight, 2 Mees. & W., 911.

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the distinction between adverse and non-adverse possession wherever it could be done, wherever any other test could be found.[6b] It is only in suits for possession of an hereditary office, or for possession of immoveable property or any interest therein *not otherwise specially provided for*, that the idea of adverse possession is allowed to come in. Thus in suits for possession of immoveable property, where the plaintiff while in possession of the property has been *dispossessed* or has *discontinued* the possession, such suits being *specially* provided for, it is *unnecessary* to enter upon an enquiry as to whether there has been what is called *adverse possession*.[6c] If there has been what is in *law*, a *dispossession* or *discontinuance* of possession, the case falls under the *special* provisions of art. 142 of Act XV of 1877.

Idea of adverse possession where allowed to come in.

If no *other person* has taken possession of the plaintiff's property, or if the so-called possession of another person is mere *detention*, or possession *on behalf* of the plaintiff, there has been no dispossession or discontinuance of possession in law, and art. 142 is inapplicable. If in the latter case the other person sets up a claim of his own title, the suit will fall under art. 144, and it will *then* be necessary to enquire *when* his possession became *adverse* to the plaintiff. (*Gobindlloll* v. *Debendro*, I. L. R., 6 Calc., 311, at pp. 314, 315). In suits for possession of an hereditary office under art. 124 of Act XV of 1877 it is also necessary to consider when the defendant takes possession of the office *adversely* to the plaintiff.

An *adverse* holding is an *actual*[7] and exclusive appropriation of land commenced and continued *under a claim of right*, either under an *openly avowed* claim, or under a *constructive* claim (arising from the acts and circumstances attending the appropriation), to hold the land against him who was in possession. (Angell, secs. 390, 398). It is the *intention* to claim adversely[8] accompanied by such an invasion of the rights of the opposite party as gives him a

Adverse possession as defined by Mr. Angell.

[6b] *Per* Wilson, J., in Gobind Lall *v.* Debendra, I. L. R., 5 Calc., 679.

[6c] *Per* Sir Richard Couch, in Mahammad *v.* Badan, I. L. R., 17 Calc., 137, at p. 143, P. C. In this case the proprietors had no sort of possession since 1842 when the Government settled the land with the defendant who exercised over it all the rights of proprietors. Here there was a dispossession or discontinuance of possession in law, and the lower Appellate Court was wrong in supposing that there must be what is called *adverse* possession before art. 142 of Act XV applied to the case.

[7] In the case of *wild* or *vacant* lands there may be *constructive* adverse possession. (See Buswell, p. 349 ; p. 123, *supra*).

[8] The enjoyment of the adverse holder must be "of such a character that an *intention* to assert a right as owner may be inferred from it." (Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175,

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cause of action which constitutes adverse possession. (*Ibid.*)

(Mere squatters).

A mere squatter or intruder who does not set up *any* claim of right cannot plead adverse possession.[9] But a person who obtains possession even by dishonestly setting up an unjust title is protected by the Indian Limitation Acts.[10]

Speaking of the present English law of limitation, Dr. Markby observes that the statute assumes that there has been a complete dispossession by a person who does not acknowledge the other's right, but denies them; and not only denies them, but interferes with them in such a way as to amount to a breach of the law for which an *action* would lie.[1] And in *Bijoy Chundra Banerji* v. *Kally Prosan-*

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183). When we speak of the defendant's adverse possession we refer to the fact of his actual and exclusive possession, united with the *intention* to hold for himself as owner. (Sivasubra *v.* Secretary of State, I. L. R., 9 Mad., 285, at p. 303). Buswell, pp. 324-8.

[9] See the judgment of Norman, J., in Watson *v.* Government (3 W. R., 73, 81) and the remarks of Steer and Levinge, JJ., in Nytyanund Ghosh *v.* Kissen Kishore (Gap No. W. R., Act X, 82); Mussamut Lall Bibee *v.* Kalinath, 2 Hay, 487; Vane *v.* Vane, 2 L. R., 8 Ch. Div., 397. See notes 3 and 8, *supra*.

Dishonest possession.

[10] Under the Civil Law (as well as under *certain* provisions of Beng. Reg. II of 1805, and Bom. Reg. V of 1827) it was necessary that the possessor must have been persuaded that he had a just cause of possession, and must have been ignorant of the fact that what he possessed belonged to another person. This rule of the Civil Law did not hold good when there was an *express* law of limitation applicable to the case. See Kowar *v.* Watson & Co., 5 W. R., 283, and p. 126, *supra*.

No mixed or opposing possessions in law. See p. 123.

[1] Markby's Elements of Law, 2nd Ed., Chap. X, sec. 396. Possession in a legal sense is *exclusive*; only one person can be in possession of the same thing at the same time (3rd Ed., sec. 307). The possession of co-tenants or coparceners under one and the same title may be treated as the possession of *one* person. But as *each* of two co-owners is *said* to be in *possession*, English lawyers meet the difficulty by stating that "each is in possession of the whole and of the half." This means that each has physical control over every part of the property, but he exercises such control partly *on behalf of himself*, in respect of his own share, and partly *as representative* of his co-owner, in respect of his co-owner's share. In contemplation of law, therefore, he is only in *possession* of his *own share*. The so called possession of the *whole*, being "the possession of a representative," is mere *detention*. (Markby, 3rd Ed., sec. 399, and p. 131, *infra*).

Where each of two owners of adjoining estates claims *exclusive* possession of the *whole* of a plot of land situate on the boundary between the two estates, and there is sufficient evidence of possession by both the one and the other, and of the title of both, to support the conclusion that each had a claim to an equal moiety, each may be declared entitled to the moiety which adjoins his estate. When such a declaration is made, the possession of each moiety by its owner is of course *exclusive* of the possession of the other. (See Khagendra Narain *v.* Matangini, I. L. R., 17 Calc., 814, P. C.)

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nah Mukerji[2] (a case governed by Act IX of 1871), Markby, J., says: "By *adverse* possession I understand to be meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession."[3] Another definition.

In the absence of an *openly avowed* claim of right to the land, the acts and circumstances attending the appropriation or user must be such as *imply or denote* such a claim. A bit of vacant land, which is of no present use to its owner, may happen to be used for various *temporary* purposes by an adjoining land-holder without exciting any particular attention. Such temporary accommodation would not necessarily mean, or be understood to mean, a *claim* to the *ownership* of the land, and would not therefore found a claim to the land by *adverse possession*.[3a] There must be an express or implied claim of right.

A *roving* possession from one *part* of a village to another may give a ryot a right of occupancy under sec. 20 of Act VIII of 1885. But a roving possession from one part of a tract of land to another will not (except perhaps in the case of wild lands) bar the right of the lawful owner, although the different periods of possession of the several parcels should amount altogether to twelve years. (See Buswell, p. 348). Roving possession not sufficient.

"Adverse possession" is a *relative* term. Possession adverse to *A* may not be adverse to *B*, and possession which is now permissive, may become adverse on the occurrence of a future event. The following general rule, showing when possession becomes adverse, and to what persons, was considered sufficiently comprehensive by Sir James Colvile, Sir Arthur Buller, and other members of the Select Committee on the Limitation Bill of 1855—1859: "The possession of any property by any person Adverse possession, a relative term.

The position of hostility implied in a dispute as to possession requires that the party in possession should hold, *not for, but against*, the *with the ownership of the other*, but adversely. (Markby, 3rd Ed., sec. 586). A possession which is permissive and *consistent with the title of another* cannot bar that title. *Per* Marshall, C. J., in Kirk *v.* Smith, Buswell, p. 311. If the person in possession of the plaintiff's property held in a character *incompatible* with the idea that the freehold remained vested in the plaintiff, then it followed that the possession in such character was adverse to the plaintiff. 2 Smith's Leading Cases, 9th Ed., p. 632, referred to in Lakshman *v.* Moru, I. L. R., 16 Bom. 722, at p. 725. Possession *consistent* with A's ownership is not adverse to *A*.

[2] I. L. R., 4 Calc., 327, 329; (S. C.) 2 Shome's Rep., 106, 107.

[3] See also the judgment of Markby, J., in Kheerodamoney *v.* Doorgamoney, I. L. R., 4 Calc., 455; (S. C.) 3 C. L. R., 315, 326.

[3a] See p. 127, *supra*, and Framji *v.* Goculdas, I. L. R., 16 Bom., 338.

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When possession becomes adverse, and to what persons.

shall be deemed adverse to every other person having or claiming to have a right to the possession of such property by virtue of a *different* title. If the person claiming such right, or any person under whom he claims, has been actually dispossessed, the period of adverse possession shall be calculated from the date of such dispossession. In all other cases, it shall be calculated from the time at which the person claiming such right or some person under whom he claims might first have asserted his right to the possession of the property."[a] Positive enactments or the doctrine of estoppel may interfere with the application[b] of this rule.

Adverse possession of a limited interest.

The extent of the adverseness of possession depends on the extent of the *claim of right* under which possession is obtained and kept. Where such claim is restricted to a limited interest in the property, the possession is adverse to that extent only. As regards a *limited* interest in immoveable property, adverse possession means possession by a person claiming that interest against the true owner, who is entitled to repudiate it and to recover immediate possession. If the party in actual possession of the property admits that he holds a limited interest in it (*e.g.*, that he holds as mortgagee), he cannot plead prescriptive title in regard to *general ownership*, but he may, in a suit for ejectment, successfully plead his adverse possession to the *extent* of the interest claimed by him. (*Madhava* v. *Narayan*, I. L. R., 9 Mad., 244, 246). Possession of

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[a] Section 7 of the Amended Limitation Bill. When a tenant-for-life is dispossessed, the reversioner or remainderman, not having a right to *immediate* possession, cannot assert his right to the possession. The possession of the trespasser during the continuance of the life-estate is, therefore, not adverse to the reversioner or remainderman.

Positive rules.

[b] According to general legal principles, adverse possession against a Hindu widow is adverse to the reversionary heirs. But under the positive rules enacted by Acts IX of 1871 and XV of 1877, it is otherwise. (See notes under art. 141, in the Appendix). An auction-purchaser of a whole estate or patni under Act XI of 1859, or Reg. VIII of 1819, is not affected by adverse possession suffered by the former proprietor or patnidar. (See notes under art. 121, in the Appendix).

Estoppel.

The doctrine of estoppel may affect the *application* of the rule given in the text. Thus, it has been held in England that a party in wrongful possession under an invalid will, which purports to give him a *limited* interest in the property, is estopped from setting up an adverse title and an adverse possession against a remainderman under the same will. (Board *v.* Board, L. R., 9 Q. B., 48, cited in Banning on Limitation, p. 107; and Hawksbee *v.* Hawksbee, 11 Hare, 230, cited in Darby and Bosanquet's Statutes of Limitation, p. 394). If *A's* co-sharer requested him to return home and manage his own share of the property, such request would *conclusively* show that the co-sharer's possession during *A's* absence was *not adverse*, at least up to the date of the request. (Dinakar *v.* Bhekaji, I. L. R., 11 Bom., 365).

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a limited interest may be just as much adverse for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property.[5a]

The question whether possession is adverse or not, is *often* one of *simple fact*, but it *may* also be a *conclusion of law*, or a *mixed question*. If the lower Courts err in drawing the proper legal conclusions from their findings on simple fact, the High Court may, even on second appeal, come to conclusions different from those of the lower Courts on this point.[5b]

The *adverseness* of possession is sometimes a question of *law*.

Since the repeal of Bengal Reg. II of 1805, and Bombay Reg. V of 1827, the law of limitation in India does not make any distinction between cases where the possession begins by conscious wrong, and cases where the possession commences in a cause believed to be just, although it may be under a title which is really defective.* Dishonesty in obtaining possession (not amounting to fraud under sec. 18 of Act XV of 1877, sec. 19 of Act IX of 1871, or sec. 9 of

Knavish possession.

[5a] Sankaron *v.* Periasami, I. L. R., 13 Mad., 467.

The interposition of a tenure between the zemindar and the cultivators of the soil cuts off the zemindar's possession, that is, his title to the rents and profits immediately derived from the cultivators. The zemindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some rent from the tenure-holder. To claim an intermediate tenure is to assert a title which materially interferes with the successful management of the zemindary. Such a claim is an *adverse* claim against the zemindar, whether it is put forward by a lessee of a portion of the zemindary, or by a stranger. (Maharaja Rajendra *v.* Sheopursun, 10 Moore's I. A., 438 ; 5 W. R., P. C., 55). See pp. 133, 134, *infra*.

Claiming a tenure is setting up an *adverse* claim against the zemindar.

[5b] Lachmeswar Sing *v.* Manowar, I. L. R., 19 Calc., 253, 262, 263, P. C. The soundness of *conclusions* drawn from facts found may be questioned in second appeal. (Ramgopal *v.* Shamskhaton, I. L. R., 20 Calc., 93, 99, P. C.)

Whether there has been a persistent *assertion of a claim of right* to the whole extent claimed, and whether the proved amount of use and enjoyment of a *part* is sufficient to constitute possession of the *whole* are questions of *fact*. (Secretary of State *v.* Nellakutti, I. L. R., 15 Mad., 101, P. C.) The bare statement of a witness that a person is in possession of the whole or a fractional share of an estate is legal evidence of such possession. (See Moneeram *v.* Dabee Churn, 13 W. R., F. B., overruling the judgment of Mr. Justice Dwarka Nath Mitter in 9 W. R., 79). As to the question of disseisin being a question of *fact*, see Taylor *v.* Horde, 1 Burr., 60. As to the question of adverse possession, generally, being such a question, see Buswell, p. 318.

Questions relating to possession are *generally* questions of *fact*.

* It is the same under the English law ; see Markby's Elements of Law, 2nd Ed., pp. 206 and 267 ; 3rd Ed., sec. 560 ; and Bejoy Chundra *v.* Kally Prosunno, I. L. R., 4 Calc., 327, at p. 331.

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Act XIV of 1859) will not prevent the possessor from availing himself of the law of limitation.[7]

Possession *primâ facie* adverse.

Possession is *primâ facie* adverse and exclusive.[8] It *is* presumed to be of right until such presumption is rebutted by evidence.[9]

Possession of co-tenants or co-owners.

If there be two *co-owners* of land, each is said to be "in possession of the whole and of the half."[10] The term *possession* is here used in a *double* sense. As regards

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Knavish possession.

[7] See Koowar Poresh Narain *v.* Watson, 5 W. R., 283, where Sir Barnes Peacock, C. J., quotes Domat's Civil Law, 2208, 2209, to show that, even according to the Civilians, the fact of obtaining possession dishonestly or knavishly will not prevent a man from availing himself of an *express* law of limitation. It is a general rule of Jurisprudence that neither *bonâ fides* nor *justa causa* are in question when the defendant pleads *limitation* as a *bar to an action*. (Markby, 3rd Ed., sec. 560). As to the Roman law, see pp. 15, 16, 23, 113, *supra*.

A's possession, not adverse to *B*, if *referable* to a *right* consistent with *B*'s ownership.

[8] *Per* West, J., in Mohanlall *v.* Amratlal, I. L. R., 3 Bom., 174, 177. See also p. 138, note, *infra*. A party is always presumed to possess for himself, *unless* it is *proved* that he *commenced* his possession for another. (Code Napoleon, art. 2230). But possession is never considered adverse if it can be referred to a *lawful* title. (Thomas *v.* Thomas, 2 Kay and J., 79; Banning, p. 277). "While there subsists any contract, express or implied, between the parties in and out of possession to which the possession may be referred as legal and proper, it cannot be pronounced adverse." *Per* West, J., in Dadoba *v.* Krishna, I. L. R., 7 Bom., 34, 39. As long as a possession can be referred to a right *consistent* with the subsistence of an ownership in being at the *commencement* of such possession so long must the possession be referred to that right, rather than to a right which *contradicts* the ownership. The *assertion* of an *adverse* title, *and submission* to it, may render the possession adverse. Ram Chandra *v.* Sadasiva, I. L. R., 11 Bom., 422. As to possession being *exclusive*, see p. 119 and note 1, p. 128, *supra*.

Possession *presumed* to be adverse.

[9] Code Napoleon, 2230. See also Bireswar *v.* Onooda, 3 W. R., 12, where the possession of a sister of a deceased Hindu proprietor of Bengal was *presumed* to be *adverse* to his legal heirs; and Rajah Pedda *v.* Aroovala, 2 Moo. I. A., 504; (S. C.) 6 R. W., P. C., 13, where the possession of a house within the zemindary by the zemindar's agent was presumed to be of right, and the zemindar's suit for ejectment was dismissed on his failure to prove that the defendant held the house on his behalf.

Where three-fourths of an estate belonged to three brothers of a joint Hindu family, and the remaining one-fourth to their sister's husband, and the whole estate was in the possession of one of the three brothers as manager of the joint family, and after his death in the possession of his son, in the absence of proof that the possession by such brother's son of the one-fourth share belonging to the sister's husband was by authority of the latter, it was held that such possession by such brother's son must be *presumed* to be adverse to the sister's husband. (Ramlakshamma *v.* Ramanna, I. L. R., 9 Mad., 482, P. C.)

Per my et per tout.

[10] Every *joint-tenant* is said to be seised *per my et per tout*, that is, they are said to take by moieties as well as by *entireties*. Blackstone gives as the meaning of this expression—*per my et per tout*—that each

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the whole, *possession* means *detention*, but as regards the half, it means *legal possession*. Each owner has physical control over every part of the property, but in respect of his co-owner's share such control is exercised, not on behalf of himself, but as *representative* of his co-owner. (Markby, 3rd Ed., sec. 399).

Possession of derivative holders *pro tanto* adverse.

The possession of derivative holders, such as tenants and mortgagees, is not adverse to the owner in *so far* as they do not claim to hold under a *different* title.[11] A mourasidar or mirasdar holding a permanent tenure under the zemindar holds under a title which is *pro tanto* adverse to

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co-tenant has "the entire possession as well of every parcel as of the whole." In Stephen's commentaries, the author remarks that the expression seems more properly to import that joint tenants are all jointly seised of the *whole* with a right to transfer in equal *shares*.

Per my et per tout.

In America, this expression is applied to *all* co-tenants, whether such tenants are in possession as joint-tenants, tenants in common, or coparceners; and it means that each co-tenant has the entire possession, as well of every part as of the whole. In other words, no one of the co-tenants can be exclusively seised of one acre, and his companion of another,—each having an undivided moiety of the whole, and not the whole of an undivided moiety. The seisin and possession of one being *prima facie* the seisin and possession of the other or others, one cannot be disseised by another without an actual ouster or notorious acts amounting to a *total denial of the rights of the others as co-tenants*, and such as to furnish a presumption of notice that the co-tenants had knowledge of such acts. (Buswell, pp. 408-10). As to what amounts to an ouster of a co-tenant or co-owner, see Lachmeswar Sing *v.* Manowar, I. L. R., 19 Calc., 253, 264, P. C.

Co-owners, not dispossessed until actual ouster.

Joint-family property.

In property belonging in common to a joint Hindu family governed by the Mitakshara, there is a community of *interest* and unity of *possession* among all the members of the family, and upon the death of any one of them, the others take by *survivorship*, that in which they had, during the deceased's lifetime, a common interest and a common possession. (Katama *v.* The Rajah of Shivganga, 9 Moore's I. A., 539). The survivor of two joint-tenants does *not* claim anything *under* the deceased joint-tenant. (I. L. R., 17 Bom., at p. 178). In joint-family properties of Hindus governed by the Bengal School of Hindu law, there is also a *unity of possession* among all the members of the undivided family. The same general rules govern the application of statutes of *limitation* as *between* co-tenants of *all* classes. (Buswell, p. 408).

Dispossession of joint-tenants by third parties.

If three joint tenants are wrongfully dispossessed by a *third* party, and one of them dies before the other two, time runs from the date of the wrongful dispossession notwithstanding that the two, by *survivorship*, have a *greater interest* in the property than they had before. The accrual of a greater interest does not create a new right of action. (Rajaram *v.* Luchman, 8 W. R., 15, at p. 20, F. B.)

[11] There must be *disputes* or *conflicting claims* in respect of the tenure or the mortgaged property, before the possession of the tenant or the mortgagee may become *adverse* to the owner. (Ramchunder *v.* Madho Kumari, I. L. R., 12 Calc., 484, 494, P. C.; Durga *v.* Shambhu, I. L. R., 8 All., 86, 91).

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Limitation against landlord.

that of the zemindar.[1] A person *claiming* such a title to the *knowledge* of the zemindar may therefore successfully plead limitation if the zemindar sues him as an ordinary tenant for *ejectment*.[2] For a similar reason, it is apprehended

[1] Shaikh Nujomoddin *v.* Lloyd, 15 W. R., 232. An intermediate tenure *cuts off the "possession,"* that is, the zemindar's title to the rents and profits immediately derived from the cultivators. (Maharajah Rajendro Kishore *v.* Sheopursun, 5 W. R., P. C., 55). See note 5*a*, p. 131, *supra*.

Some *pattahdars* under Government are *not* tenants

Lands in the 24-Pergunnahs and in Calcutta are often *held* under the Government on payment of a permanently-fixed *jumma* or tribute. Though the Government grants *pottahs* to the holders of these lands, the title of the Government rather resembles a seignory than that of a lessor with a reversion. Such holders are absolute owners of the lands. The Government has no title to the possession of such lands. There is no relation of landlord and tenant between the Government and the owner in such cases. (Gunga Gobind Mundle *v.* The Collector of the 24-Pergunnahs, 7 W. R., P. C., 21). Zemindars also are *proprietors* of revenue-paying estates. The holdings under Government in Calcutta and the 24-Pergunnahs resemble in many respects the permanently-settled estates of zemindars. In Government *khas* mehals, such as escheats and island *churs*, Government is the landlord, and the occupiers of the land are tenants.

[2] Shaik Nujomoddin *v.* Mr. Lloyd, 15 W. R., 232; Rajah Sahib Perhlad *v.* Doorgapersad, 12 W. R., P. C., 6, 14; Tekaetnee Goura *v.* Musst. Saroo, 19 W. R., 252, P. C.; Petamber Baboo *v.* Nilmoney Sing, I. L. R., 3 Calc., 793; Drobomoyi *v.* Davis, I. L. R., 14 Calc., 323, at pp. 344, 345. If a grant of a (mokurarree) lease (in lieu of maintenance) is not a grant of a *permanent* tenure, and if the grantor or his heirs may resume the same from the hands of the grantee's heirs, the possession of the tenure by the grantee or his heirs does not become adverse so long as there is no *dispute* or *conflicting claim*. It becomes adverse when the tenant sets up the *permanency* of the tenure and the superior holder denies it. (Ramchunder *v.* Madho Kumari, I. L. R., 12 Calc., 484, 494, P. C.) According to these rulings a person who is *really* a *tenant* of some sort cannot plead limitation, in a contest with his landlord in respect of an adverse right as a *perpetual* tenure-holder, except from the date when the landlord has had *notice* of such adverse claim. But those rulings are not applicable to cases where the defendant has been in possession of the land under a perpetual lease granted to him by a *trespasser* against whom alone the plaintiff obtained a decree for possession subsequently to such grant. The defendant in such a case may successfully plead limitation whether the plaintiff had *notice* of his claim or *not*. The possession of the perpetual lessee in such a case is adverse from the date of his entry. (Gossain *v.* Bepin, I. L. R., 18 Calc., 520, at pp. 525, 526). It has been held that the perpetual lessee in such a case is so completely a *stranger*, that *formal possession* of the land delivered to the plaintiff in execution of his decree against the grantor of the lease, does not give the plaintiff a fresh start. (*Ibid.*, see p. 118, *supra*).

Plea of limitation by a person claiming a perpetual tenure.

(*Trespasser's* lessee in perpetuity).

Suit to establish *proprietary* right.

A plaintiff who merely sues to establish his *proprietary right* as against a tenure-holder is not bound to prove that he has been in *actual* possession of the land within twelve years before action brought, since if the defendant has held as a tenant, under the plaintiff, the defendant's possession cannot be adverse to the plaintiff, and limitation cannot be pleaded against him. (See Protab Narain Mukherjee *v.* Kartic Chunder Mukherji, 10 W. R., 192).

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that a person claiming as a lessee for a definite term (say for 99 years) to the knowledge of the landlord may, after twelve years' occupation, be allowed to plead limitation in a suit for ejectment during such term.[3]

Is the possession of a lessee for a *term*, adverse?

It has been broadly laid down that the possession of a tenant for a term of years is not adverse to the landlord who has, in such a case, a reversionary interest in the land.[4] But during the *currency* of the term the tenant holds under a title which is *pro tanto* different from, and inconsistent with, the title which the landlord sets up when he sues for *khas* possession, and the former's possession is *so far* adverse to the latter. The doctrine of the English law is that a grant of land for a term of years, however long,

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[3] The ryot's occupation, though subordinate, is in a sense adverse to the landlord, so far as it qualifies his power of dealing with the land at will. (Thomas Savi *v.* Punchanan Roy, 25 W. R., 503). Mr. Justice Markby *doubted* whether under the decisions of the Calcutta High Court a tenant for a *term* of years, let into possession by the true owner's wife acting as his representative during his prolonged absence from home, could successfully plead limitation against such owner as a protection to such possession, even during the term. The learned Judge was *clearly* of opinion that a person entering into possession under a *perpetual* lease granted by the wife, such lease not being binding on her husband, would, like a *purchaser* from the wife, hold the land *adversely* to the husband from the very beginning. (Bejoy Chunder *v.* Kally Prosonno, I. L. R., 4 Calc., 327). Where the defendant in possession of land set up a *pretended tenancy* under the plaintiff, which the latter *throughout denied*, the case was regarded as throughout a case against a *trespasser*, and not as one between landlord and tenant. (Maidin *v.* Nagapa, I. L. R., 7 Bom., 96, at p. 99). The admissions of the defendant will prevent him from pleading prescriptive title in regard to *general ownership*, but (after holding the land for the period of limitation) he may rely on it in regard to the *subsidiary* interest claimed by him. (See Madhava *v.* Narayan, I. L. R., 9 Mad., 244).

Cases of *invalid* leases, *for a term*,—and *in perpetuity*.

Pretended tenancies.

In a suit by the landlord to recover possession of lands in the occupation of the defendants under a lease which is *absolutely void*, limitation commences to run from the date of taking possession under the void lease. But if the defendants have paid any rent to the landlord and thereby entered into the relation of tenants, limitation runs from the determination of *such* tenancy. (See President of Magdalan Hospital *v.* Knotts, 4 App. Cas., 324).

Void leases.

[4] See Bijoy *v.* Kali Prasanna, I. L. R., 4 Calc., 327; (S. C.) 2 Shome's Rep., 106; and compare Messrs. Watson & Co. *v.* Rani Shurut Sundari, 7 W. R., 395; and Shaik Nujomoddeen *v.* Mr. Lloyd, 15 W. R., 232. According to Bushby *v.* Dixon (3 B. & C., 298, 304) the law would ascribe the possession of lands by tenants to their landlords, except where positive enactments affect the rule. (Lyell *v.* Kennedy, 14 App. Cas., 437, at p. 456). In Bungsraj *v.* Mohunt, 20 W. R., 398, Markby, J., held that a *sub-tenant* holding land under a tenant of the plaintiff does not hold adversely to the plaintiff. But where a *sub-tenant encroached* on the *khas* land of the plaintiff, Wilson, J., held that he could plead limitation against the plaintiff. (Rhidoy *v.* Nobin, 12 C. L. R., 457). See p. 137, note 9, *infra*.

May *sub-tenants* plead limitation?

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does not confer on the grantee any estate in the land, and that the grantee, taking no estate in the land, can only have *detention* of it, and not *possession* under the grant.[5] But the law of British India does recognise the interest of a lessee for a term as an interest in land. The lessee's possession of this interest is, therefore, his own possession, and *during* the *continuance* of the lease, is *pro tanto* adverse to the landlord.

Plea of adverse possession, *during* lease.

Plea of adverse possession, *after* lease.

After the *determination* of a tenancy, however long it may have existed, when the landlord becomes entitled to *khas* possession, the tenant cannot, of course, plead that his *former* possession was adverse to his lessor, and that the lessor's suit for *khas* possession is barred by such possession. (See art. 139, Sched. II, Act XV of 1877).

Tenancy by sufferance.

The possession of a *tenant by sufferance* is not adverse to the landlord. If the tenant holds over although he pays no rent, and the landlord does not by an act of dissent make the continuance in possession tortious or wrongful, limitation does not run against the latter.[6]

Possession by a *third* party's tenant is wholly adverse to the owner.

The doctrine that a tenant's possession is really the landlord's possession[7] was carried to such an extent that it was held that a tenant of *A*, in possession of another's land as such tenant, cannot plead limitation if *A* does not join him in raising the question.[8] But the correct doctrine appears to be that if the defendant denies the plaintiff's title and holds the land against the plaintiff, he may, although himself a tenant of another porson, plead limitation against the plaintiff.[9]

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[5] Markby's Elements of Law, 3rd Edition, sec. 388.

[6] Adimulam *v.* Pir, I. L. R., 8 Mad., 424.

A tenant holding over after the expiration of the term, becomes either a trespasser or a tenant at the *option* of the landlord, and very slight acts on the part of the landlord are sufficient to make the occupant a tenant, and the *mere continuance* of the occupant in possession fixes him as tenant, if the landlord insists upon it. (Buswell, p. 425). The *presumption* is that the continuance is *not* wrongful. Blackstone.

[7] So long as nothing occurs to determine the tenancy, the possession of the lessee is the possession of the lessor—Parbuti *v.* Ram Chand, 3 C. L. R., 576; Narain *v.* Bhookto, and Haradhan *v.* Hulodhur, 25 W. R., 56. See Bushby *v.* Dixon, cited in note 4, p. 136, *supra*.

In England, since the 3 and 4 William IV, c. 27, the possession of a tenant-at-will or a tenant for a term of years becomes adverse to the person entitled, from the *end* of the first year or other *period* of the tenancy, and limitation begins to run from that date. (Lyell *v.* Kennedy, 18 Q. B. D., 796, 813).

[8] Sristidhar *v.* Gopal Chunder, 1 W. R., 172. See also Mr. Justice Trevor's judgment in Watson *v.* Government, 3 W. R., 73, 77; and Jardine Skinner *v.* Ranee Shama, 3 W. R., 144.

[9] See the judgment of Loch and Pundit, JJ., concurred in by Peacock, C. J., in Watson *v.* Government, 3 W. R., 73, 75, 76 and 78.

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Where a tenant during his tenancy encroaches on the adjoining[9a] lands of *his landlord*, the *presumption* is that the lands so encroached upon are *added* to the tenure, and form *part* thereof, for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of the landlord, unless it clearly appeared by some act done *at the time*, that the tenant made the encroachment for his own benefit. The tenant is bound, at the *end* of his term, to deliver up the land so added, with the rest of the premises demised.[10] The act of the tenant in taking possession of more land than was let to him, though it may possibly have been a trespass and wrongful, may, in most cases, equally well have been done with the assent, express or implied, of the landlord, and so have been rightful; and in the *absence of any proof* to the contrary, it is treated as the latter. When the landlord sues to assert his proprietary rights over the excess land, the possession of the tenant cannot, *primâ facie*, be treated as adverse.[10a] In *Esubai* v. *Damodar*,[11] Sargent, C. J., speaking (in 1891), with reference to an *encroachment* made by a tenant on 6 square yards of the adjoining property of his landlord, remarked that "such an encroachment, although made before 1862, would not, according to English law, be presumed to have been made by the tenant absolutely for his own benefit and against the

Tenant's encroachment on other land of his landlord *presumed* to be part of *holding*.

See also Junglu *v.* Bama Sunduri, 1 W. R., 202 : and Thomson's Law of Limitation, 2nd Edition, p. 159. An under-tenant may plead limitation even when his own landlord is a tenant of the plaintiff. Rhidoy *v.* Nobin, 12 C. L. R., 457, cited at p. 135, *supra*.

[9a] The tenant's holding, and the land encroached upon, need *not* be *conterminous*. It is sufficient if the land is so near the former that it may be presumed that the position of the tenant as tenant enabled him to approve. (Earl of Lisburn *v.* Davies, 1 C. P., 259).

Need not be conterminous.

[10] See Woodfall, 12th Ed., p. 668 ; 22 W. R., 246. In the recent case of Attorney-General *v.* Tomline, 15 Ch. Div., 160, it has been held that the presumption of accretion or addition, may also be rebutted by the *subsequent* dealings of the parties, *e.g.*, by renewing the lease so as *not* to *include* the encroachment as an accretion.

Presumption how rebutted.

[10a] Gooroodass Roy *v.* Issurchander Bose, 22 W. R., 246 ; see also Andrew *v.* Francis, 2 Hay, 560, and Erskine *v.* The Government, 8 W. R., 232, 233 ; but cf. Indro *v.* Golluck, 12 W. R., 350. Where it appears from the evidence adduced that the tenant has encroached on the *khas* land of the zemindar, *without* even his implied consent, the zemindar may, if *he chooses*, require the tenant to give up the excess land even *before* the expiration of his tenure. (Nuddyar Chand *v.* Meajan, I. L. R., 10 Calc., 820). Where the land can *not* be deemed to form *part* of the tenure, the tenant may, of course, plead adverse possession. (Doe *v.* Massey, 17 Q. B., 376). But the general English rule that an encroachment by a tenant is *presumed* to be made by him as an *addition* to his *holding*, and consequently for the benefit of his landlord, is quite independent of any question of *assent* or *dissent* by the landlord. (Whitmore *v.* Humphries, L. R., 7 C. P., 1, at pp. 5 and 6)

Lessor's assent or dissent—effect of.

[11] I. L. R., 16 Bom., 552.

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landlord, but would be deemed to be *added* to the tenure and form *part* thereof, and such a *presumption* may, we think, be made in this country."

Rule, general; not confined to lessor's land.

The rule that the landlord is entitled, at the determination of the tenancy, to recover from the tenant, not only the land originally demised, but also any land which the tenant may have added to it by encroachment, is not confined to cases of encroachment on the land of the landlord; it applies also to cases where the land encroached upon does not belong to the landlord.[12] Where *A's* tenant, during his tenancy, encroaches on the land of *B*, a *neighbouring proprietor*, and holds possession thereof for the prescribed period,—as against the tenant, it is *presumed* that he took the additional land as part of his tenancy, and for the benefit of the landlord. This presumption against the tenant may of course be rebutted by clear evidence that he intended the encroachment for his *own* benefit and not for the aggrandisement of his original holding. But as against *B*, it is by no means clear that such a *presumption* will be made in favor of the landlord.[1]

Encroachments on the land of *third* persons.

If it appears, independently of the *presumption*, that the tenant has taken possession of the land, as *part of his holding under A*, the tenant, *as well as A*, may plead limitation against *B*, and show that *B's* right has been extinguished.[2]

Summary of the law.

In another Bengal case it has been laid down that an encroachment made by a tenant upon land adjoining to, or even in the *neighbourhood* of, his holding, is *presumed*, in the absence of strong evidence to the contrary, to be made for the benefit of the landlord; that this rule applies to all land so encroached upon, whether belonging to the *landlord*

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[12] *Both* sorts of encroachments by a tenant, do, *as a rule*, enure for the benefit of the lessor. (Whitmore *v.* Humphries, L. R., 7 C. P., 1).

[1] See the remarks of Lord Campbell in Doe *v.* Massey, 17 Q. B., 376, referred to by Mr. Justice Norman in Watson *v.* Government, 3 W. R., 73, 81. "The principle must be that the *lessee* is *estopped* from denying that the whole premises are those which were *demised* to him. It would be strange to say that the tenant steals for the benefit of his landlord." If it be said that the land was taken in for the landlord's benefit, "the landlord is thereby entitled as against the *tenant* who took, but not against a *third* person."

No *presumption* against *third* persons.

[2] Messrs. Darby and Bosanquet (at pp. 395, 396, of their work on Limitation) say: "If a tenant during the continuance of his tenancy encroaches on land, and holds it *as part* of the demised premises for the period of limitation prescribed by the statute, his landlord will at the end of the term *generally* have the benefit of the encroachment." See also the cases referred to in note (9), *supra*.

The case of an encroachment is a *peculiar* case in the English law, which, *as a rule*, treats it as being *part of the holding*. As between the landlord and the tenant, limitation does not run until after the determination of the tenancy. (L. R., 7 C. P., 1, at p. 7, and 5 Ch. D., at p. 763). The *rent* may be *readjusted during* the tenancy. (22 W. R., 245).

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or to a *third* person; that if the tenant has held the land *with* his own tenure and has acquired a title against the third person by adverse possession, he has acquired it for his landlord, and not for himself[2a]; and that where the tenant encroaches on the land of his landlord *without* the latter's *permission*, he has no absolute right to retain the land so encroached upon till the *end* of his tenancy. (*Nuddyar Chand* v. *Meajan*, I. L. R., 10 Calc., 820; note 10*a*, p. 137).

Prior encroachments.

It should be observed that a man in adverse possession of land does not lose the benefit of his adverse possession as against its owner by *subsequently* becoming *tenant* of an adjoining plot of land, belonging to the same landlord.[2b]

Onus of proving that possession is not adverse.

As possession is *primâ facie* adverse, it is for the party who contends that his opponent's possession is only *permissive* to prove that it is so. If the defendant has been in possession for more than twelve years, the plaintiff, to remove the bar of limitation, must prove that such possession was not adverse, but in the character of an agent,[3] or of an usufructuary mortgagee,[4] or that it was otherwise permissive.[5] But where occupation was originally *permissive*,

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[2a] Compare this, with the rule that a *principal* may acquire a possessory title to real estate by receiving the rents thereof for twelve years through a person avowedly acting as *agent* in ignorance of his *own* title to the estate. (See Williams *v.* Pott, L. R., 12 Eq., 149, and note 1, p. 119, *supra*.

[2b] Dixon *v.* Batty, L. R., 1 Ex., 259; Starling, p. 258.

[3] Meer Useedoollah *v.* Beeby Imaman, 1 Moo. I. A., 19: (S. C.) 5 W. R., P. C., 26. Ramalakshamma *v.* Ramanna, I. L. R., 9 Mad., 482, P. C.

[4] 10 Moore's I. A., 151, Sewaji Vijoya *v.* Chinna Nayana.

[5] Occupation by a bailiff, a servant, a licensee, and a guardian have been held to be *permissive*. (Lyell *v.* Kennedy, 14 App. Cas., 437; Brighton *v.* Brighton, L. R., 5 C. P. D., 368; Wall *v.* Stanwick, L. R., 34 Ch. D., 763; Banning, 2nd Ed., p. 156). Possession is evidence of title, and is primarily *exclusive*. It is for him who impugns this exclusive title to show that possession arose in some way which has preserved his right. He must show some agreement or acknowledgment of his title, such that possession is deprived of its ordinary effect through being held on a *joint right* or on one *subordinate* to the right set up. The party out of possession must give positive evidence of some contract or other jural relation which *accounts for* the other's *sole* possession—Ramchandra *v.* Naryan, I. L. R., 11 Bom., 216, 221, 222. Many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would between joint owners naturally bear a different construction. (Ali Khan Mahomed *v.* Abdool, F. B., 12 C. L. R., 257, 269; I. L. R., 9 Calc., 744, referred to by their Lordships of the Privy Council in Lachmeswar Sing *v.* Manowar, I. L. R., 19 Calc., at p. 263). Thus, if the subject of suit is a portion of joint-family property, the possession of it by one coparcener may be referred to the continuing *consent* of his co-sharers, and may not therefore be adverse. (See Sheo Pershad *v.* Leelah, 20 W. R., 160; and Yusuf Ali Khan *v.* Chubbee Singh, 5 N. W. P., 122).

Where the property is joint.

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Change of permissive into adverse possession.

its conversion into an occupation of a wholly *adverse* nature is not to be presumed in the absence of affirmative evidence to establish the change.[6] A person who holds possession on behalf of another does not, by a mere denial of that other's title, make his possession adverse, so as to give himself the benefit of the statute of limitation.[7]

No act or default of a tenant, a trustee, or a bailee, can by itself change the character of the possession which he originally acquired. If such person repudiate the title of the owner, there must be such *acquiescence* on the part of the latter as would put an end to the original relation of the parties, before the former can be said to be in "adverse possession."[8]

Non-payment of rent by tenant.

The mere non-payment of rent for twelve years, by a person who is proved to have entered into possession as a tenant, does not convert the tenancy into adverse possession.[9] Even if the tenant during his tenancy pays the

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[6] See Markby's Elements of Law, 2nd Ed., sec. 347; 3rd Ed., sec. 380; Waheeoodden *v.* Jhinguree, 2 N. W. P., 16; Brown, 77; Ramdhun *v.* Nobin, 12 W. R., 250; Bangsraj *v.* Mohunt, 20 W. R., 398.

According to the Code Napoleon, art. 2231: "When a person has commenced his possession in right of others, he is always presumed to possess by the same title if there be no contrary proof."

[7] Bejoy Chunder *v.* Kally Presana, I. L. R., 4 Calc., 327; Madhub *v.* Sham, I. L. R., 3 Calc., 243; Dadoba *v.* Krishna, I. L. R., 7 Bom., 34. This would be so, *at least*, until the denial of the principal's right or some unequivocal act inconsistent with that right, had been brought to the *knowledge* of the principal—Markby's Elements, 2nd Ed., sec. 347. When a person enters on possession and is left in possession in the *first* instance, in accordance with a contract (*e.g.*, a lease or a mortgage), he cannot "change the character of that possession by *his own mere will*"—Dadoba *v.* Krishna, I. L. R., 7 Bom., 34, 38. See also Ramchandra *v.* Sadasiv, I. L. R., 11 Bom., 422, and Mulji *v.* Manohar, I. L. R., 12 Bom., 322. In the last case, West, J., refers to the maxim *Nemo potest possessionis suae naturam mutare.* Certain priests of a Hindu temple erected shops on a part of the courtyard of the temple and appropriated the rents thereof. In a suit by the manager of the temple to eject the priests, it was held by West, J., that the priests having come in as servants or representatives of the Idol, they could not by a mere wish change the nature of their possession, if possession it was to be called. The priests held for the Idol, and the manager held for the same Idol. In that ideal personage the two rights concurred, and one could not therefore really be adverse to the other, so as to give rise to a title by prescription. (*Ibid.*, p. 324).

Character of possession, *not* changed by the *mere will* of the holder.

A person who has got into possession in the fiduciary character of an *agent*, cannot assert a claim on his *own* account, at least, until he has got rid of the fiduciary relation by *informing* his principal of this *change* of his intention. (See Williams *v.* Potts, L. R., 12 Eq., 149).

[8] Angell, secs. 444, 445. The *assertion* of an adverse title *and submission* to it may render the possession adverse—Ramchandra *v.* Sadasiv, I. L. R., 11 Bom., 422.

[9] Prem Sukh *v.* Bhupia, I. L. R., 2 All., 517, F. B.; Troylukho *v.* Mohima, 7 W. R., 400; Watson *v.* Government, F. B., 3 W. R., 73,

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rent to a third person and attempts to substitute him in the place of his landlord, without openly renouncing or putting an end to the tenancy, the possession of the tenant shall still be looked upon as the possession of the landlord.[10] The tenant's attornment to a third person will not affect the title of the lessor so long as the tenant does not directly repudiate the tenancy, and the landlord knowing this does not acquiesce in the act.[1] The tenancy must actually or constructively be determined before the possession of the tenant can become adverse to the landlord.[2] Eviction from the demised premises by the lessor, or by those who claim under him, or by persons who have paramount right to him, may have the effect of determining the tenancy and relieving the tenant from the liability to pay rent. But

Attornment to a third person.

Repudiation and attornment.

Eviction of tenant.

82; Rungolall *v.* Abdool, 3 C. L. R., 119; 5 Bom. A. C., 85; and Dadoba *v.* Krishna, I. L. R., 7 Bom., 34. See Lecture XI.

[10] Parbutti Dasi *v.* Ramchand, 3 C. L. R., 576. This was also the English law *before* 3 and 4 Will. IV, c. 27. (Doe *v.* Danvers, 7 East, 299, 321; note (2), *infra*). In Sarbanand *v.* Pransankar, I. L. R., 15 Calc., 527, it has been held by Prinsep and Pigot, JJ., that a zemindar and his tenants may by *agreement* determine any relation of landlord and tenant existing between them, that an unsuccessful attempt on the part of the zemindar to obtain a *surrender* of the lands does not determine the tenancy, and that subsequent acts of the tenants in *repudiating* the zemindar as their landlord, and in *attorning* to a third person, cannot by themselves operate so as to determine their tenancy. In this case, the attornment by the tenants to another person was *not* shown to have been even *known* to the zemindar, and the learned Judges did not consider what the effect of such *knowledge* might have been. The right to receive the *rents* from the tenants of the land is a right to the *actual* possession of *tangible* property within the meaning of sec. 145 of the Criminal Procedure Code of 1882. (*Ibid.*)

Repudiation and attornment.

The landlord may, if he *chooses*, treat the third person as a party who has dispossessed him. Radhamadhub *v.* Juggernath, 14 W. R., 183. As to *grantees* of tenants, see p. 142, *infra*.

[1] See Banning, 145, and Hovenden *v.* Lord Annesley, 2 Sch. and Lef., 624; Brown, pp. 105, 106.

[2] Parbutti Dassi *v.* Ram Chand, 3 C. L. R., 576. In England *before* the enactment of 3 and 4 Will. IV, c. 27, sec. 9, payment of rent before and during the term of the lease to a wrong person did not, subject to the question of acquiescence, amount to an ouster—Smith's Leading Cases, Vol. II, pp. 732, 741, 8th Edition; Banning, 145. See note (10), *supra*. Even after the passing of 3 and 4 Will. IV, c. 27, it has been held in England that receipt of rent from tenants in possession in order to exclude the true owner, must always be by a person *wrongfully claiming* to be *entitled* to such rent. Receiving or claiming to receive rent *on behalf* of the true owner, whoever he may be, cannot have the effect of excluding or dispossessing such owner. (Lyell *v.* Kennedy, 14 App. Cas., 437, at pp. 460, 461). If, however, the tenant attorns to a third person, and if the latter receives the rent wrongfully *claiming* to be *entitled* to such rent, time commences to run against the real landlord (under the Statute of Will. IV) from the first wrongful receipt of rent. (Banning, 2nd Ed., p. 154).

English law after 1834.

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an ouster by the acts of a trespasser without title has no such effect.[3]

Act IV of 1882.

The Transfer of Property Act (No. IV of 1882), sec. 111, expressly enacts that the tenant must renounce his character as such by setting up a title in a third person or by claiming title in himself, *and* the landlord or his transferee must *do some act* showing his intention to determine the tenancy. In cases governed by the Act, both these conditions must be fulfilled before the tenancy can be determined and converted into adverse possession.

Grantees of tenants and other derivative holders.

Under art. 3479 of the Louisiana Code, and art. 2239 of the Code Napoleon, a purchase of the property from the tenant, the depositary or any other derivative holder, operates as the basis of an adverse possession in favor of the purchaser; but according to Lord Mansfield (in *Atkyns ex. dem. Taylor* v. *Horde*) in the case of a purchase from the tenant, the landlord is not bound, but may *choose*, to consider himself as dispossessed by the purchaser.[4] The Indian Limitation Acts (sec. 5, Act XIV of 1859, and arts. 133 and 134 of Sched. II, Acts IX of 1871 and XV of 1877) expressly provide for the protection of purchasers from trustees, mortgagees, pawnees, and depositaries, but omit to mention the case of purchasers from tenants. How-

Possession by tenant's grantee not necessarily adverse.

ever, as the landlord, before he puts an end to the tenancy, is not entitled to immediate and direct possession of the property, it has been held (by Peacock, C. J., and Jackson, J.) that the possession of a grantee claiming under the tenant does not become adverse to the landlord, so as to oblige him to sue the grantee before the determination of the tenancy.[5]

Safer course.

If the landlord is apprized of the fact that the tenant disavows the tenure and sets up a title in himself, or in a third person, the *safer course* is to determine the tenancy.[6] But the law nowhere *obliges* the lessor to put an end to the lease on the ground of forfeiture.[7] And in suits by the landlord, as such, to recover possession from the tenant,

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[3] Mrs. B. Donzelle v. Girdharee, 23 W. R., 121; Rung Lall v. Lalla, 17 W. R., 386; Gopanund v. Lalla, 12 W. R., 109; Khajah Abdool Gunny v. Poorno Chunder, 2 Hay, 524.

[4] See also Angell, sec. 443.

[5] C. T. Davis v. Kazee Abdool, 8 W. R., 55, 58, 59.

[6] According to Lord Redesdale (in Hovenden v. Lord Annesley, 2 Sch. and Lef., 624), if the lessee attorns to another, and the lessor neglects to proceed for the forfeiture, he has no right to affect the rights of third persons on the ground that the possession was betrayed; and there must be a limitation to that as to every other demand. See Brown on Limitation, p. 313, and Shephard, p. 65.

[7] See sec. 111, Act IV of 1882, and Banning on Limitation, p. 147.

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under art. 139, Sched. II of Act XV of 1877, if the tenant claims only a *terminable* lease, it is unnecessary to consider whether the tenant's possession has become adverse or continues to be non-adverse,[7a] provided the suit is instituted within the prescribed period from the date when the tenancy is determined.[7b]

Trespasser's possession of demised premises.

The majority of the Judges in *Poole* v. *Griffith*[8] were of opinion that where a stranger enters as a trespasser upon a part of the land held under a lease, and continues in possession for the prescribed period, the right of the lessor, on the expiration of the lease, would be unaffected, although the right of the lessee would be barred. It has also been held in this country by Norman and Seton-Karr, JJ., on review, that during the continuance of a lease, the eviction of the lessee from the demised premises does not give the lessor any cause of action against the trespasser, if the lessor is not deprived of his rent, or rent is not received adversely to him by a stranger.[9] There are also several dicta of Sir Barnes Peacock, C. J., and other Judges to the effect that a landlord cannot maintain an action of ejectment, either against a tenant or against a trespasser, before the tenancy is determined.[10] Sir James Colvile in his Prescription and Limitation Bill provided for the protection of landlords against such trespasses.

[7a] See p. 127, *supra*, and notes under art. 139, in the Appendix. See also I. L. R., 17 Calc., 137, at p. 143.

English law.

[7b] Under sec. 3 of 3 and 4 William IV, c. 27, a lessor is considered as a reversioner, and it has been held that by a discontinuance of the receipt of the rent alone, for more than twenty years, he is not prevented from recovering the premises at any time within the prescribed period from the *determination* of the lease. Under the same statute, in the case of a *tenancy at will*, limitation begins to run from the *termination* of the tenancy, and the tenancy is deemed to determine at the end of *one year* from its commencement. (See Buswell, note 7, p. 422).

[8] See 15 Ir. C. L. R., 270, and Brown on Limitation, p. 487. Lord Selborne in 5 App. Cas., pp. 741 and 742, says that the *determination* of a lease (by a surrender of it) gives the lessor for the *first* time a right to sue the trespasser. (See note 6*a*, *infra*).

[9] Hurronath *v.* Rajah Indoo Bhusun, 8 W. R., 135. The non-receipt of rent under such circumstances may give the landlord a cause of action if it amounts to a *dispossession* of his *interest* in the demised premises. See, however, pp. 140, 141, *supra*.

Declaratory suit by lessor.

[10] See Mr. Davis *v.* Kazee Abdool, 8 W. R., 55, 58; and Woomesh Chunder *v.* Rajnarain, 10 W. R., 15, 18. It has been held by Sir Richard Garth, C. J., that although a landlord cannot sue for *khas possession* so long as the tenancy continues, it is *open* to him to bring a suit against the trespasser for the purpose of having his *rights declared* as against such trespasser. In a suit against the tenant and the trespasser, the landlord, it has been held, may ask for the further relief that he should be placed in the same position "as before" as regards the tenant—Bissessuri *v.* Baroda, I. L. R., 10 Calc., 1076.

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Prosunnomoyi Dasi v. Kalidas Roy, discussed.

This provision,[1] however, along with all the provisions relating to prescription, was omitted from the Act as passed in 1859. It is true that the case of a landlord is excepted from the rule (laid down in art. 141 of Act IX of 1871, and art. 140 of Act XV of 1877), that the period of limitation for a *reversioner* begins to run from the time when his estate falls into possession. This might lend some support to the contention that a landlord (unlike *other* reversioners) is not entitled to count the period of limitation from the time when the estate falls into possession, that is, when he becomes entitled to *khas* possession. And it was so held in some cases by the Calcutta High Court.[2] But considering the hardship[3] to which landlords would be subjected by the adoption of this rule, a different construction should be put upon the law.[4] If possession does not become "adverse" to the claimant until he himself is entitled to *immediate* possession,[5] it is clear that, under art. 144 of Sched. II, Act XV of 1877, a landlord, suing to eject the trespasser within twelve years after the determination of the lease, cannot be met by any plea of limitation. The article applicable to the case is art. 144, and the *inference* drawn from the language of art. 140, not being a necessary one, must be disregarded in the construction of a law of limitation. The lessor is a *reversioner* whose suit as against the *tenant* is provided for by art. 139. And the words "other than a landlord" in the next article (No. 140) were

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[1] See sec. 7, cl. 3, of the Bill. In the Statement of Objects and Reasons, Sir James says: "In sec. 7, I have thought it right to introduce two clauses to meet the case, which often occurs, of the loss of land, part of an estate subject to an undertenure, during the subsistence of that tenure, by the encroachments of conterminous proprietors. It seemed hard that a title by prescription should be acquired against the superior landlord (assuming him to retain a reversionary interest in the soil) by such encroachments, whilst, for want of the *actual* right of possession, he was unable to resist them. His rights are protected by cl. 3. In like cases, where the sub-tenure is of that nature that the superior landlord retains no right in the soil but can only enforce the right to rent by the sale of the putnee or other undertenure, the rights of the auction-purchaser are protected by cl. 4." The second class of cases was practically provided for by sec. 7, Act XIV of 1859, corresponding to art. 121, Act XV of 1877.

[2] See Prosunnomoyi v. Kalidas, 9 C. L. R., 347, following Lekraj v. Court of Wards, 14 W. R., 395; and Brindabun v. Bhoopal, 17 W. R., 377.

[3] They are unable to resist such encroachments. See 10 W. R., 15, F. B. A suit for damages against a poor ryot would scarcely afford any relief.

[4] A different construction *has been* put upon the law, see note (6), *infra*.

[5] See the definitions of adverse possession, pp. 127 *et seq.*, *supra*.

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introduced probably with the object that the two articles might not overlap each other. A landlord or zemindar in this country has very often no reversionary right in the soil, and the Legislature has thought fit to deal separately with suits by "a landlord" (who may or may not be a reversioner), and suits by a reversioner "other than a landlord." All that *necessarily* follows from the language of arts. 139 and 140 is, that a landlord cannot take advantage of art. 140 when he brings an ejectment against his *tenant*. Besides, as the possession of a trespasser does not *become adverse to the lessor* until the latter acquires a right to the *khas* possession of the demised premises (by the determination of the tenancy), his right to sue is saved by the general provisions of art. 144. To hold that twelve years' possession by a trespasser, of the whole or a part of the demised premises, would bar the right of the lessor, although the lessee does not renounce his character as such, and the lease is still subsisting, is to violate the maxim that "prescription does not run against a party who is unable to act." (*Contra non valentem agere non currit præscriptio*). The general principle of the law is to bar a person who *has a right to enter* if he *does not* exercise that right in a certain time, not to bar those who *cannot* exercise that right. It is satisfactory to note that the objectionable rulings on this subject have now been practically overruled.[s]

Prosunnomoyi Dasi *v.* Kalidas Roy, discussed.

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[s] In a case decided on the 18th of August 1882 (Krisna Govind *v.* Huri Churn, 12 C. L. R., 19; I. L. R., 9 Calc., 367), this question of limitation to a suit for ejectment against a person who had dispossessed the plaintiff's lessee during the currency of the lease, was again discussed before a division bench of the Calcutta High Court, consisting of two Judges, of whom one was a party to the decision reported in 9 C. L. R., 347. The learned Judges say: "By what rule in the Limitation Act is the plaintiff's right to sue governed? It may fall either under art. 140 of the second schedule, or under art. 144. It will be convenient first to refer to art. 139. This deals with a case where the suit is by a landlord to recover possession from a tenant, and the time runs from the determination of the tenancy. That is the only section dealing expressly with the case of a landlord *as such*. The next article says that in a suit 'by a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immoveable property,' the point from which time runs is 'when his estate falls into possession.' Probably in this article, the expression 'other than a landlord' means other than a landlord *as such* suing his *tenant*. If that be so, then that article would apparently govern this case, and the time would run from the termination of the *ijara*. If the case does not fall within the article, then it must fall within art. 144, as being a suit 'for possession of immoveable property or any interest therein not hereby otherwise specifically provided for.' Then the period of limitation begins to run from the time when the possession of the defendant becomes adverse to the plaintiff. 'Plaintiff,' by the interpretation-clause, includes any person through whom the plaintiff claims. But the plaintiff does not claim through the ijardar. Therefore possession adverse to the ijardar is not possession adverse to the present

Reasons for overruling that decision.

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Effect of surrender or renewal of lease.

The *surrender* of a lease, even before the expiration of the term, operates as a *determination* of the lease. (Sec. 111 of Act IV of 1882). A surrender of the lease by the lessee, after he has been dispossessed by a trespasser, gives the landlord an immediate right to sue the trespasser for *khas* possession, and the possession of the latter becomes *adverse* to the former from the date of the surrender. A *renewal* of the lease before the expiration of the term operates as a formal surrender of the old lease, and does not prevent the accruer of an immediate right of action to the lessor against the *trespasser*.[6a]

Possession by trustee's grantee.

The possession of trust-property by the trustee is deemed to be the possession of the *cestui que trust* or the beneficiary. But if the trustee alienates the property to an assign for valuable consideration, the possession of the assign becomes adverse to the beneficiary.[7] It has been held in America, that a trustee who distinctly and openly *repudiates* his trusteeship and assumes absolute ownership of the trust-property, may commence to acquire an adverse possession against his *cestui que trust*.[8] But under the Indian Trusts Act (No. II of 1882) if a trustee renounces his character as such, he does not thereby extinguish the trust, and he is not thereby discharged from his office (secs. 71 and 77). And a trustee who has accepted the trust cannot afterwards renounce it *except* with the permission of a competent Court or *with the consent of the beneficiary*, or by virtue of a special power in the instrument of

Repudiation by trustee.

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plaintiff. This conclusion is entirely in accordance with the construction put upon an earlier Limitation Act, in the case to which we have been referred, reported in 10 W. R., 15.[n] See also Sheo Sohye *v.* Luchmeshur Sing, I. L. R., 10 Calc., 577; Sharat Sundari *v.* Bhobo, I. L. R., 13 Calc., 101. Cf. note (10), *supra*, and notes under art. 139.

[6a] See the judgment of Chitty, J., in Ecclesiastical Commissioners *v.* Treemer [1893], 1 Ch., 166, at p. 167. See also Lord Selborne's judgment in Ecclesiastical Commissioners *v.* Rowe, 5 App. Cas., 736, at pp. 741, 742. The possession of a *sub-lessee* or *under-lessee*, even after the surrender of the original lease, may *not* be adverse to the lessor from the date of the surrender. (*Ibid.*) See also sec. 115, Act IV of 1882.

[7] Section 10, and art. 134, Act XV. Darby and Bosanquet, p. 335. The possession of land, forming the endowment of a temple, by a transferee of one of two *co-trustees* of a temple, is also adverse to the other co-trustee. (Kannan *v.* Nilakandan, I. L. R., 7 Mad., 337. Cf. case of alienation by one of two widows, p. 155). A trustee cannot delegate or assign the *trust* itself. (Krishna *v.* Ranga, I. L. R., 16 Mad., 73).

[8] Angell, sec. 174; Banning, p. 188; Buswell, p. 477. For Indian cases impliedly adopting this view, see Virasami *v.* Subba, I. L. R., 6 Mad., 54, 59; Rakhal *v.* Modhu, 3 B. L. R., 409; Jagannath *v.* Bidyanund, 10 W. R., 172; Puram *v.* Lalji, I. L. R., 1 All., 403. Where a trustee professes to act as full owner, and not as trustee, where he expressly or impliedly *repudiates* the trust, his acts are not binding on his *successor* in the trust. (Shri Ganesh *v.* Keshavrav, I. L. R., 15 Bom., 625).

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trust (sec. 46). Nor is a trustee allowed either for himself or another to set up or aid any title to the trust-property adverse to the interest of the beneficiary (sec. 14). A proposed trustee may, *before* accepting the trust, disclaim it (sec. 10), and a proposed beneficiary may renounce his interest under the trust by disclaimer or by setting up a claim inconsistent therewith (sec. 9). Under sec. 10 of the Indian Limitation Act of 1877, it is not necessary to consider whether the possession of the trustee or his legal representatives becomes adverse to the *cestui que trust*, or continues to be non-adverse, so long as the trust-property may be followed *in his or their hands*.

Repudiation of trust.

Whilst the trustee is in possession of the estate, the right of the beneficiary is safe, so that if the trustee mistakes his beneficiary and makes over the profits of the estate to a wrong person, such wrongful recipient of the profits, it has been held in England, does not acquire a title by adverse possession against the rightful *cestui que trust*.[9] It being the duty of the trustee to pay over the profits to the beneficiary, payment to a wrong person will not give that person a title.[10] But if one of two beneficiaries is excluded by the other who received the rents to the exclusion of the trustee as well, limitation will commence to run against the excluded beneficiary.[1]

Limitation as between two beneficiaries.

If a trustee suffers *adverse* possession for the prescribed period, the right of the *cestui que trust* will be barred. If the trustee does not eject the trespasser, and the beneficiary does not compel him to do so within the prescribed time, the trespasser acquires a title by adverse possession.[2] The possession of trust-property by a purchaser from the

Possession of the trust-estate by a trespasser.

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[9] See Lester *v.* Pickford, 34 Beav., 576, cited in Lewin on Trusts, p. 752, 7th Edition; and Brown on Limitation, p. 275. But if a stranger takes actual possession of the property, sec. 10 of Act XV of 1877 will not protect the *cestui que trust*.

Non-performance of trust.

The legal title of the trustee, and the beneficial interest of the *cestui que trust*, together constitute but one title. If the trustee remain in possession, though he does not execute the trust, his possession will not operate as a bar. Non-performance of the trust does not make the trustee's possession adverse to the *cestui que trust*. (Buswell, pp. 476, 477). The trustee's possession, even when he does not perform his trust, is not adverse, because it is *according* to his *title*. Lewin, 9th Ed., pp. 984, 988.

[10] See the latter part of the judgment of the Privy Council in Karan Sing *v.* Baker Ali, I. L. R., 5 All., 1.

[1] Lewin, 7th Ed., p. 751.

[2] Lewin, 7th Ed., pp. 737, 738. The beneficiary may require the trustee to transfer the trust-property to him (sec. 56, Act II of 1882), or to compel him to perform any particular act of his duty (sec. 61, Act II of 1882). If the trustee is *dispossessed* by a stranger, and the *cestui que trust* does not compel him to recover possession, the suit

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trustee is adverse to the beneficiary.[3] In these respects, the relation of lessor and lessee is more favorable to the lessor than the relation of beneficiary and trustee to the beneficiary.

Possession of mortgaged property.

The possession of mortgaged property by *any* of the two parties (*i.e.*, by the mortgagor, or by the mortgagee), if not *inconsistent* with the rights of the other party under the terms of the mortgage, can not be adverse to such other party.

Possession by mortgagor's or mortgagee's grantee.

So long as the mortgagor, his representative or his assign, asserts a title to redeem, and advances no other title inconsistent with it, his possession of the mortgaged property does not become adverse to the mortgagee.[4] Such possession becomes adverse from the date of foreclosure.[5] The possession of a purchaser of the property from the *mortgagor* without notice of the mortgage, becomes adverse to the mortgagee, if the right of the mortgagee to enter into possession has accrued.[6] Even the payment of interest

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of the *cestui que trust* may be barred by limitation. (Hovenden *v.* Lord Annesley. Per Lord Redesdale. Lewin, 9th Ed., pp. 984, 988).

Decree, or adverse possession, against trustee.

A trustee and his *successors* in office form a continuing representation of the trust property. A decree against the trustee, is, in the absence of fraud or collusion, binding upon his successors in office. (Prosunno Kumari *v.* Golabchand, 23 W. R., 253, at p. 256. In this case, the trustee was the *shebait* of an idol). It follows that adverse possession against the trustee is adverse to his successors as well.

[3] See sec. 10, Act XV of 1877, and arts. 133 and 134, Sched. II.

[4] Pran Nath Roy *v.* Rookea, 7 Moo. I. A., 323; (S. C.) 4 W. R., P. C., 37. The present Limitation Act, art. 147, Sched. II, however, expressly prescribes a limit of sixty years to a suit for *foreclosure or sale*, from the date when the mortgage-debt falls due. In such suits, therefore, the question whether the mortgagor's possession was adverse or not cannot and *does not arise*. The operation of the *general principle* is, in such cases, controlled or excluded by a *positive enactment*. Ram Chandra *v.* Sadasiv, I. L. R., 11 Bom., 422, 425.

[5] Ghinarain *v.* Ram Monaruth, 7 C. L. R., 580; I. L. R., 6 Calc., 586; and Brohmomoyee *v.* Jugobandhu, 7 C. L. R., 583; I. L. R., 6 Calc., 564. See also Pugh *v.* Heath, 7 App. Cas., 235.

Case of purchaser in execution.

[6] Angell, sec. 449, note; Anundo Moyee *v.* Dhonendra, 16 W. R., P. C., 19, 20; and Brojonath *v.* Khelat Chunder, 16 W. R., P. C., 33. In Anundomoyee's case, the defendant purchased the mortgaged property in *execution* of a decree against the mortgagor. In Brojonath's case a part of the mortgaged property was sold by the mortgagor to the defendant's predecessor in interest. This last case does not appear to have been noticed in Durga *v.* Shambhu (I. L. R., 8 All., 86) in which the Court held that the position of a person who purchases the mortgaged property by asserting a right of pre-emption against the mortgagor and his vendee, is not analogous to that of an auction-purchaser in execution, and that such a person cannot ordinarily plead adverse possession against the mortgagee. But whether or not the position of a pre-emptor is analogous to that of the purchaser in Brojonath's case is not discussed in this case. As to the rights and liabilities of

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by the mortgagor to the mortgagee will not render the possession of the purchaser other than adverse.[7] Payment of interest.

The possession of a purchaser of the property from the *mortgagee* is adverse to the mortgagor and his representatives, from the date of purchase, and is expressly protected by the Limitation Acts.[8]

"It has always been laid down" (says Lord St. Leonards in his Handy Book on Property Law, p. 117) "that neither the mortgagor nor the mortgagee can, by any adverse act, bar the right of the other."[9] A repudiation of the mort- Repudiation by mortgagor or mortgagee.

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execution purchasers, see, further, the notes to sec. 3 of Act XV of 1877, in the Appendix.

[7] Brojonath *v.* Khelat Chunder, 16 W. R., P. C., 33, 35. For the English law on the subject, see *Doe d.* Palmer *v.* Eyre, 17 Q. B., 366; Chinnery *v.* Evans, 11 H. L. C., 115; and Brown on Limitation, p. 309.

[8] See Radhanath Dass *v.* Gisborne & Co., 15 W. R., P. C., 24; and art. 134, Sched. II, Act XV of 1877. This article applies when the purchase purports to be a purchase of the property as an absolute property. It cannot, of course, apply where the purchaser takes an assignment of the property subject to the mortgage, and is admittedly a mere representative of the mortgagee. Such an assignee, like the mortgagor himself, holds in *subordination* to the title of the mortgagee, and to convert his possession into an adverse holding he must renounce or disclaim the mortgagee's right, and the mortgagee must have notice of the disclaimer. (Buswell, p. 362).

A lease or other grant executed by the mortgagee *as such*, may be set aside by the mortgagor *after redemption*. See Adjoodhya *v.* Girdharee, 2 N. W. P., 199.

[9] See Jeechoo Sahoo *v.* Syud Museeoollah, 21 W. R., 13. A mortgagee who enters into possession of an entire estate under a mortgage of the same from *A* does not, by a subsequent purchase of *A's* brother's widow's share in the estate, *ipso facto* change the character of his possession, even so far as such share is concerned. If he has to sue to recover that share as *owner*, he must show that his vendor was in possession within twelve years of the suit, or that after his purchase he appropriated the profits of that share separately and as owner (with the knowledge and acquiescence of his mortgagor). Nundolall *v.* Jadunath, I. L. R., 14 Calc., 674, 678. The *original* character of the possession *as mortgagee* is *not changed* by the assertion of an absolute purchase of the property, *unless* the alleged purchase is valid and binding. Byari *v.* Puttanna, I. L. R., 14 Mad., 38, at p. 42. See also Bhagavant *v.* Kondi, I. L. R., 14 Bom., 274. Where mortgagee *claims* to have purchased equity of redemption.

Where the mortgagee obtains a decree for the sale of the mortgaged property, but does not enforce his right to sell within three years from the date of such decree, the mortgagee may sue to redeem the property within the period allowed by art. 148, and his suit will not be barred although the mortgagee was put into possession of the property by a Revenue Officer, on his paying the Government revenue which had accrued due upon the property, and although he was in such possession for more than twelve years. Such payment and such possession do *not affect* the *original relationship* of mortgagee and mortgagor, and such possession is not adverse to the mortgagor. (Dasratha *v.* Nyahal Chand, I. L. R., 16 Bom., 134). Where he pays arrears of revenue and is put into possession.

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gagor's title, or the mere assertion of an adverse title by a mortgagee in possession, does not make his possession adverse, so as to enable him to shorten the period of sixty years within which the mortgagor may bring his suit for redemption.[10] Similarly the mortgagor's denial of the mortgage will not by itself be sufficient for abbreviating the sixty years' period prescribed by Act XV of 1877 for foreclosure or sale. So long as the period of sixty years does not elapse from the dates mentioned in the 3rd column of articles 147 and 148 of Schedule II, Act XV of 1877, in suits for foreclosure or redemption, it is unnecessary to consider whether the possession of the mortgagor or mortgagee has become adverse or continues to be non-adverse."[11]

Effect of acquiescence.

But the *acquiescence* of the party whose title is repudiated may change the character of the possession, and estop him from taking advantage of these provisions of the law. (See p. 140, *supra*).

Case of a co-mortgagor redeeming the mortgage.

The mortgagee's possession, *before* the mortgage is redeemed, is possession *for* the mortgagor, and for *all* the heirs of the mortgagor; and it is only *after* redemption that the possession of any of the heirs who has redeemed the entire mortgage can *possibly* become *adverse* to the others, even though the *mortgagee* had all along recognised that one alone as entitled to the equity of redemption. The appropriation

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Decree against mortgagor.

A mortgagee is not bound by a decision passed against the mortgagor in a case instituted against him by a third person, if the mortgage-bond was executed prior to the institution. See Karon Sing v. Bakar Ali, I. L. R., 5 All., 1 P. C.; Dooma Shahoo v. Joonarain, 12 W. R., 363. See also Bonomali v. Koylas Chunder, I. L. R., 4 Calc., 692. Persons who have taken transfers of property, subject to a mortgage, cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties. (Umesh Chunder v. Zahur Fatima, I. L. R., 18 Calc., 164, at p. 179, P. C.)

As long as the relation of mortgagor and mortgagee subsists, the possession of the mortgagor cannot be adverse to the mortgagee—Ghinarain v. Ram Monaruth, 7 C. L. R., 580. The mortgagee's possession being derivative, it should *never* operate in his favor. But this *general principle* must yield to such an *express* enactment as that contained in art. 148, Sched. II, Act XV of 1877. See note 4, *supra*. Before Act XIV of 1859, suits for redemption were *not* barred by the lapse of any period of limitation. (See pp. 42, 51, *supra*).

[10] Ajoodhya Pershad *v.* Esharee Dyal, 10 W. R., 219; and Ali Mohammed *v.* Lalta Buksh, I. L. R., 1 All., 655. The same rule applies to the mortgagee's *representatives*—Mussad *v.* The Collector, I. L. R., 10 Mad., 189. Where a person enters into possession as agent or trustee for the *mortgagee*, he cannot afterwards set up an adverse possession as *owner*, so as to defeat the mortgagor's right to redeem. (Bhagvant *v.* Kondi, I. L. R., 14 Bom., 274, at p. 281. See also Byari *v.* Puttana, I. L. R., 14 Mad., 38.

[11] See pp. 126, 127, *supra*.

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by that heir, of the whole of the malikana payable by the mortgagee, does not amount to that *full proprietary* possession which could only be claimed *after* the redemption.[1] A co-heir or co-sharer who redeems the entire mortgage holds the property as a *lienor*.[1a] His possession can not become *adverse* to the others *until* he asserts an exclusive title and the others submit to the right thus set up.[2] Limitation under art. 144, Sched. II, Act XV of 1877,

Case of one of several co-heirs of the mortgagor redeeming the entire mortgage.

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[1] Umrunnissa *v.* Muhammad, I. L. R., 3 All., 24, F. B. See also Chathu *v.* Aku, I. L. R., 7 Mad., 26. Adverse possession, within the meaning of art. 144, Act XV of 1877, is hostile possession of the *very right* which the plaintiff claims. The adverse possession of the defendant must be of the *same nature* as that sought by the plaintiff. (*Ibid.*) But as has been already pointed out, the possession of mortgagees or tenants may be *pro tanto* adverse to the owner.

Adverse possession under art. 144.

In Nundo Coomar *v.* Brojo Bhookun (4 Wym., 36 ; Thompson, p. 212), the possession of a person who was *not* a legal *heir* of the mortgagor, but who had nevertheless paid off the mortgage-debt and executed a fresh mortgage, was held to be adverse. But where one of two *co-mortgagors* or the *legal heirs* of one of them redeem the whole property and re-mortgage the same to a third person, their possession does *not* become adverse to the other co-mortgagor, unless the property is held with an *assertion* of an *adverse* title. (Moidin *v.* Oothumangami, I. L. R., 11 Mad., 416).

Equity of redemption claimed by (1) a *stranger* ; (2) a co-mortgagor.

It was held by Pontifex, J., in an unreported case (second appeal No. 2035 of 1878, decided on the 10th March 1880), that one of two mortgagors or his representative, is entitled to a period of sixty years for the recovery of property redeemed by his co-mortgagor, the co-mortgagor in such a case standing in the shoes of the mortgagee. (See also I. L. R., 2 Mad., 223, Asansab *v.* Vamona, and secs. 95 and 100, Act IV of 1882). In Nura Bibi *v.* Jagat Narain (I. L. R., 8 All., 295, 299) Straight, Offg. C. J., and Tyrell, J., held that the owner of a portion of a mortgaged estate, the whole of which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co-mortgagor, and that his suit for redemption is governed by art. 148, Act XV of 1877. The Court expressly adopted this unreported ruling of Pontifex, J. In Ashfaq *v.* Wazir, I. L. R., 11 All., 423, it has been held that a co-sharer by redeeming the whole of the mortgaged property, stands in the shoes of the mortgagee from whom he redeems. He is simply, by *subrogation*, on the same footing as an ordinary person would be as representing the mortgagee's interest in the property. A suit by the *other* co-sharers for their shares of the property is barred if not brought within sixty years from the date when the right to redeem the original mortgage accrued to the mortgagors. (This case is reported again at p. 1, I. L. R., 14 All.) But supposing the co-mortgagor (*after* redemption) sets up an adverse title, and the others acquiesce in such assertion, art. 144 (and not art. 148) will apply to the case. (See Ramchandra *v.* Sadasiv, I. L. R., 11 Bom., 422 ; I. L. R., 11 Mad., 418 ; and note 2, *infra*).

Co-mortgagor's suit to recover mortgaged property. Art. 148,—Calcutta and Allahabad. Art. 144,—Bombay and Madras.

[1a] See sec. 95 of Act IV of 1882 ; Asansab *v.* Vamana, I. L. R., 2 Mad., 223 ; Ashfaq *v.* Wazir, I. L. R., 11 All., 423, at p. 429.

[2] Ram Chandra *v.* Sadashiv, I. L. R., 11 Bom., 422. The possession of one of several members of a family does not become adverse "without something more pronounced than mere holding after redemption." (Bhavdin *v.* Sheikh Ismail, I. L. R., 11 Bom., 425). The

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it may be observed, is computed only from the date when the possession becomes *adverse*.

Adverse possession of right to redeem and right to foreclose.

It has been held by the House of Lords that *adverse* possession of an equity of redemption for the full period of limitation, is a bar to another person claiming the same equity of redemption. A *stranger*, claiming the equity of redemption, paying interest on the mortgage, and in possession of the mortgaged property to the exclusion of the lawful representative of the mortgagor, may acquire a title by adverse possession against such representative.[3] So a person claiming the equity of foreclosure (or the right of the mortgagee) may, as against the lawful representative of the mortgagee, acquire a title by adverse possession.[4]

Adverse possession against owner commenced *before* mortgage.

If after adverse possession has been acquired against the owner, but before the period of limitation has expired, he mortgages the property, limitation runs against *both* mortgagor and mortgagee from the date of the owner's dispossession. Mr. Hayes, in his Introduction to Conveyancing, has laid it down that "the effect of the statute must always be determined with reference to the actual state of the title when time begins to run, and that when the time has once commenced running (against the absolute owner), no subsequent alteration in the title will postpone the bar."[5]

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same principle applies to Mahomedan as well as to Hindu co-mortgagors. (Faki Abas *v.* Faki Nurudin, I. L. R., 16 Bom., 191, at p. 196). See notes under art. 148, in the Appendix.

[3] Cholmondeley *v.* Clinton, 2 Jac. and Walk. R., 1; Nundo Coomar *v.* Brojo Bhookun, 4 Wym., 36; Puttappa *v.* Zimmaji, I. L. R., 14 Bom., 176, at p. 180. In this last case a daughter-in-law of the mortgagor, though she was *not his legal heir*, was in possession of the equity of redemption adversely to his rightful heirs, and acting as if she were the owner of the property and receiving the rent which the mortgagee had agreed to pay by the mortgage-bond. The daughter-in-law sold the property and discharged the mortgage-debt, and the mortgagee thereupon, *at her instance*, put her vendee in possession of the property. It was held that the possession of the daughter-in-law and her vendee was adverse to the rightful heirs. The exclusive receipt of *profits* of land from the *mortgagee in possession* by one of several *mortgagors* before redemption can have no more effect against the other mortgagors than if the profits are not paid at all but withheld by the mortgagee. Chathu *v.* Aku, I. L. R., 7 Mad., 26.

Right to redeem claimed by a co-mortgagor.

Adverse possession of equity of redemption may be claimed by a mortgagee (note 9, p. 149), by a *co-mortgagor* or one of the *legal heirs* of a mortgagor (pp. 150-2), or by a *stranger* (paragraph 2, note 1, and paragraph 1, note 3, *supra*).

[4] See Ammu *v.* Ramkrishna, I. L. R., 2 Mad., 226, 228.

[5] Darby and Bosanquet, p. 237. Section 2 of the English Real Property Limitation Act (37 and 38 Vict., c. 57) expressly enacts that if the person last entitled to a particular estate is barred by limitation, the holder of a *subsequent* estate or interest, claiming under any deed, will or settlement executed, or taking effect *after* the time when the right to sue first accrued to the particular tenant, is also barred by limitation.

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Payment of interest.

Even if the mortgagor makes payment of interest on the mortgage-debt, the Indian law, in this respect differing from the English law, does not give the mortgagee a fresh start as against the person who *dispossessed* the mortgagor.[6]

Possession of a trespasser on mortgaged premises.

Where a mortgagor in possession of the mortgaged property is dispossessed by a third party (*i.e.*, by a stranger) who does not claim either under the mortgagor or the mortgagee, the possession of such third party, it has been held, is adverse to the mortgagee, and he, as well as the mortgagor, is barred by the twelve years' limitation.[7] And where a mortgagee in possession of the mortgaged property is dispossessed by a person who claims adversely to both the mortgagor and the mortgagee, it has been held that the possession of such person is adverse to the mortgagor as well as to the mortgagee, and that the former as well as the latter will be barred by the twelve years' rule.[8]

But as, during the currency of a mortgage, one of the parties to the mortgage is not entitled to the immediate possession of the property, it may be doubted if the possession of a trespasser could be adverse to the party who is not entitled to such possession, and who cannot, therefore, bring an ejectment against the trespasser.[9] It is settled law in this country that a decree obtained by a third party against the mortgagor in possession, in a suit instituted after the date of the mortgage, is not binding against the mortgagee;[10]

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[6] Compare 7 Will. IV and 1 Vict., c. 28, and sec. 6, Act XIV of 1859, and art. 146, Act XV of 1877. See Darby and Bosanquet, p. 356; Brown, p. 450; Banning, 2nd Ed., p. 168; note 7, p. 149, *supra*.

[7] See Sheoumbur *v.* Bhowanee, 2 N. W. P., 223 (1870), and Prosunna *v.* Ramkumar, W. R. Gap No., 1864, p. 375. See also Karon Sing *v.* Bakar Ali, I. L. R., 5 All., 1, P. C., which was a case of *rehan* or hypothecation.

[8] See Ammu *v.* Ramkrishna, I. L. R., 2 Mad., 226. See also Messrs. Gisborne & Co. *v.* Radhanath, 5 W. R., 253-9; and Syed Akbar *v.* Toolsee Ram, 23 W. R., 17.

Obstruction, to the obtaining possession by a mortgagee *as such*, by persons who, while claiming a lien on the property, *admitted* the mortgagor's title, is not adverse possession as against the mortgagee's title as *absolute owner* after foreclosure or sale. Purmanand Dass *v.* Jamnabai, I. L. R., 10 Bom., 49, 56.

[9] See Vithoba *v.* Gangaram, 12 Bom., 180, where it was held that a trespasser on the possession of the mortgagee could only succeed to such estate as the mortgagee possessed, and that he could not in any way affect the equity of redemption.

[10] Bonomally *v.* Koilash Chunder, I. L. R., 4 Calc., 692; (S. C.) 1 Shome's Rep., 14; Dooma Sahoo *v.* Joonarain, 12 W. R., 362; and Karon Sing *v.* Baker Ali, I. L. R., 5 All., 1. See also Krisnajee *v.* Gobiud, 9 Bom., 275. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor. (Umes *v.* Zahur, I. L. R., 18 Calc., 164, at p. 179, P. C.)

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and as it follows that a decree obtained against a mortgagee in possession is not binding against the mortgagor, adverse possession against one of the parties to the mortgage, it may be said, cannot affect the other, unless the latter is also deprived of the possession of his right or interest.

Possession of a *bonâ fide* purchaser in cases of concealed fraud.

In the case of property purchased *bonâ fide for a valuable consideration*, from a party who had acquired it by a concealed fraud, limitation, in favor of the purchaser, runs from the time when the party entitled was deprived of the property by means of such fraud. The purchaser from a trustee or mortgagee may by due diligence discover the nature of the interest under which the seller has occupied, but the purchaser of property from a person who has acquired it by a concealed fraud can have no reason to suspect any defect in the title of the seller. This is why the Indian Limitation Acts do not place such a purchaser in the same category with purchasers from trustees, mortgagees, and depositaries.[1]

Possession of Hindu widows and their grantees.

The possession of a Hindu widow or other female heir, taking a limited interest under the Hindu law, not being inconsistent with the title of the male reversionary heir, cannot be adverse to him. The possession of a *grantee* of the widow, also, is not adverse to the reversionary heir until she dies (or remarries), for the grant is good, at least, for the lifetime of the widow,[2] (or until her re-marriage). A widow or a grantee of the widow cannot destroy the title of the heir by *allowing* a friend or relative to have twelve years' possession of the estate. Such possession shall be presumed to be possession with her or his consent, and

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[1] See the special report of the Indian Law Commissioners, dated 26th February 1842. Sir James Colvile in his amended Bill proposed that the possession of the purchaser (in a case of concealed fraud) should be deemed adverse from the date of the *purchase*, but he withdrew the proposition afterwards. A person who is in possession by virtue of a *fraud*, holds *adversely* to the title of the person impeaching the fraud. (See Hovenden *v.* Lord Annesley, 2 Sch. and Lef., 633).

[2] Suntokhee *v.* Musst. Belasee, 10 W. R., 276; Pursut *v.* Palut, I. L. R., 8 Calc., 442; Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512, at p. 515.

Alienation by one of several successive female heirs.

In this last case Ayyar and Shephard, JJ., held that the possession of a person who gets into possession under an invalid alienation made by any female heir was not adverse to the male reversioner until the death of the last of the successive female heirs. The decision of the same learned Judges on an application for a review of judgment, as reported in 1 Madras Law Journal, page 392, shows that their first ruling went too far, and that where there are *more than one* intervening female heir, the possession of an alienee of one of such female heirs, though not adverse to such female heir, may, at least, after her death, be adverse to the other female heirs and to the male reversioner. All these rulings are of importance only in cases which are governed by the law as it stood *before* Act IX of 1871 came into operation.

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cannot be adverse to the heir.[3] The possession of a son adopted by the widow, like the possession of a purchaser from the widow, does not become adverse to the heir until his right of entry accrues by the death of the widow.[4] A Hindu widow, it has been held by the Chief Court of the Panjâb, cannot, by merely asserting an absolute proprietary title, make her possession adverse to the heir so as to bar his right after her death.[5] But where the widow is dispossessed, the possession of the trespasser is adverse, not only to the widow, but also to the so-called reversionary heir after her.[6] As the widow represents the whole estate of her husband, and as a decision against her with regard to such estate is, in the absence of fraud or collusion, binding upon the reversionary heir,[7] adverse occupation against her is adverse to the heir in the same way as adverse possession against the father is adverse to the son, or that against a deceased executor is adverse to the person who next *represents* the

Repudiation of reversioner's title.

Possession of a trespasser on the widow's estate.

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[3] Shiroocoomaree *v.* Keshab, 18 W. R., 1, 3, P. C.; Kokilmoni *v.* Manik, I. L. R., 11 Calc., 791, at p. 794. In this last case the widow left the defendant in possession of the property, and used to receive maintenance from him until she died.

[4] Srinath *v.* Mohesh Chunder, 12 W. R., F. B., 14; and Rajendro *v.* Jogendro, 15 W. R., P. C., 41; Basdeo *v.* Gopal, I. L. R., 8 All., 644.

[5] See Rivaz, p. 214, 3rd Ed.

[6] In the case of an improper alienation by the widow, the alienee's possession during the lifetime of the widow does not give the widow any cause of action. The *right* to possession and the *actual* possession are not separated until the death of the widow. *Alienation* implies *action* on the part of the widow; *adverse possession* against her implies *inaction* or a *passive lying by.* (See Pedder *v.* Hunt, 18 Q. B. D., 565, at p. 570; Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, at pp. 210, 221, 231; Nobin Chunder *v.* Ishur Chunder, 9 W. R., 505, at p. 510, last paragraph). But where there are *two* widows, an alienation by one without the consent of the other, may give the latter a cause of action even during the life of the former. Even when there is a sufficient necessity for borrowing money to pay the Government revenue, "that necessity does not render a mortgage by *one* widow binding upon the joint estate which descended from their deceased husband, so as to affect the interest of the surviving widow." (Sri Gajapati *v.* Maharani Sri Pusapati, I. L. R., 16 Mad., 1, at p. 10, P. C.)

Alienation and adverse possession.

Where there are *two* widows.

The possession of a vendee or other alienee being possession on his *own* behalf, and *not on behalf of the vendor or alienor*, is in one sense *adverse* to the latter, but the possession of the former being *consistent* with the lawful title, is *not adverse*, in the sense that such possession does *not* give the latter *any cause of action*. Where the alienation or sale is *invalid*, and not binding on the alienor or vendor, the possession of the vendee or alienee is entirely adverse to the vendor or alienor. The possession of the *vendor*, after the sale, when inconsistent with the transfer of lawful *title* is in every sense adverse to the vendee.

Possession of vendor or vendee when adverse.

[7] The Shiva Gunga Case, 2 W. R., P. C., 31; (S. C.) 9 Moo. I. A., 539; Arunachala *v.* Panchanadam, I. L. R., 8 Mad., 348; Jugul Kishore *v.* Jotendro, I. L. R., 10 Calc., 985, P. C.

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Successive female heirs.

estate.* Under Hindu law, the widow, the daughter, the mother, and some other female heirs take a qualified estate, which is interposed between that of the last male owner, and the male reversioner, but each of these successive female heirs fully represents the estate for the time being, and is during her life the complete heir of the last male owner.*a Possession under color of a false or invalid grant from the last male owner is of course adverse to the female heirs as well as to the male reversioner.*b Where the widow or other female is sued in her character as heir to the last male owner, for the recovery of a debt due by the last male owner, and a decree obtained against his estate, if the estate is sold in execution of such decree, possession under such a sale is adverse to the widow or other female representative as well as to the male reversioner.*c If the female heir for the time being sells the estate without lawful cause, the purchaser entering into possession would not be a wrong-doer during the life of such heir. No cause of action would accrue to the female heir against him for entering under her grant, although it would not be binding as against the person representing the estate after her death.*d The possession of the estate by the purchaser after the death of the female heir who made the sale is adverse to all succeeding heirs, whether male or female.

Last male owner.

Two joint heirs.

The same principle applies where two widows or two daughters jointly represent the estate. The possession of an alienee of *one* of the widows or daughters, is adverse to the *other* widow or daughter.*e

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* Nobin Chunder *v.* Issur Chunder, 9 W. R., 505, F. B.; see also Amrittolall *v.* Rojonikant, 23 W. R., 214, P. C. This rule did not apply, if the widow *colluded* with the person holding *adverse* possession. A reversioner aggrieved by such *fraud* on the part of the widow and the person in possession, could treat such possession as if it were the possession of an *alienee* of the widow. (See 9 W. R., p. 508, and 23 W. R., p. 215). It may be mentioned here that this and other observations as to alienations by, and the dispossession of, widows apply equally to mothers, daughters, and other female heirs who take a *qualified* estate like the widow. (See 9 W. R., p. 509). Art. 142 of Act IX of 1871 speaks of a Hindu *widow*, but the article was probably intended to be co-extensive with art. 141 of Act XV of 1877.

*a See Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512, 514; and 12 W. R., 14, at p. 15, F. B.

*b See 23 W. R., 214, P. C. See p. 157, *infra*.

*c See Chhaganram *v.* Bai Moti, I. L. R., 14 Bom., 512, at p. 515.

*d See 9 W. R., 505, at p. 507, F. B.

*e The principle appears to be that the alienee's possession was treated as the possession of a trespasser against *all* persons (male or female) representing the inheritance *other* than the alienor and other than persons who assented to the alienation. (See Ragava *v.* Sambasiva, 1 Mad. Law Journal, 392; Ganga Churn *v.* Juggernath, 12 W. R., 97;

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Under the *express* provisions of art. 142, Act IX of 1871, and art. 141, Act XV of 1877, the so-called reversionary heir is now entitled to count the twelve years from the *death* of the widow.[9] Where the right to sue is not barred by the provisions of the old law, these Acts allow the reversionary heir twelve years from the death of the widow within which to bring his suit for possession, and it is not in the power of the widow or of any person claiming either through or against her to abbreviate that period or substitute another period or starting point of time.[9a] As to whether these articles apply to cases where the widow accelerates the succession by becoming a *byragini*, or by *surrendering* her estate in favor of the next reversioner, see notes to arts. 141 and 144 of Act XV of 1877, in the Appendix. Section 9 of Acts IX and XV, and the general principles of law, would prevent the application of these articles to cases where the last male owner was dispossessed, and time commenced to run *before* the widow succeeded him. The subsequent alteration in the title would not postpone the bar of limitation.[10]

Express provisions of the Acts of 1871 and 1877.

Dispossession of last male owner.

A special mode of devolution or an incapacity for alienation does not necessarily involve an incapacity of submitting to *adverse possession* until limitation has given a title by prescription to the adverse holder. If the holder of the estate for the time being *fully represents* the estate, a restricted power of dealing with it does not prevent limitation

Possession of a trespasser during the incumbency of a predecessor in interest or office.

Raj Kishore *v.* Girish, 4 B. L. R., 136. In the second case the possession of an alienee of one of two Hindu daughters was held to be adverse to the surviving daughter and her sons. In the last case, the possession of an alienee of a Hindu widow was held to be adverse to her daughter and daughter's sons from the date of the death of the alienor.

[9] In Srinath Kur *v.* Prosunno Kumar Ghosh, I. L. R., 9 Calc., 934, a Full Bench of the Calcutta High Court, on the 17th August 1883, overruled Saroda *v.* Doyamoyee, I. L. R., 5 Calc., 938, which was to a contrary effect. See also Chandranath Dass *v.* Asaram, 1 Shome's Rep., 167; Dwarkanath *v.* Komolmonee, 12 C. L. R., 548; Kokilmonee *v.* Manick Chunder, I. L. R., 11 Calc., 791; Basdeo *v.* Gopal, I. L. R., 8 All., 644; Ram Kali *v.* Kedar Nath, I. L. R., 14 All., 156, F. B.; Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512, at p. 514; Cursandas *v.* Vundravandas, I. L. R., 14 Bom., 482, at pp. 488, 489; Chhaganram *v.* Bai Motigoori, I. L. R., 14 Bom., 512, at p. 515. In the Allahabad Full Bench Case, Edge, C. J., expressed no opinion as to whether or not, art. 141 of Act XV of 1877 might apply if the reversionary heir had to get rid of an adoption, an alienation or a deed before he could recover possession. But the current of decisions is in favor of the proposition that an unlawful adoption or alienation by the widow does not prevent the reversionary heir from claiming the privilege accorded to him by art. 141 of Act XV of 1877. See notes under arts. 118 and 125, in the Appendix.

[9a] Cursandas *v.* Vundravandas, I. L. R., 14 Bom., 482, at p. 489.

[10] See Darby and Bosanquet, p. 237.

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from operating against it. A Hindu father under the Mitakshara, the present holder of service vatan lands, the *sebait* or *mutwullee* of sacred property, may thus submit to *adverse possession* for twelve years, and thereby prevent his successors from suing for the recovery of the property.[1]

Possession of members of joint family.

The general rule, that the possession of one member of a joint Hindu family is the possession of all, does not apply where the claimant has been clearly excluded. In the latter case the possession is adverse, and time will run from such adverse possession.[2] But under the express rule laid down in art. 127, Act XV of 1877, limitation runs from the time when the exclusion becomes *known* to the plaintiff. Where the bulk of the estate of a Hindu family is held and managed by a single member of the family, and the other members receive and enjoy part of the lands as *seer*, the possession of the bulk of the estate by the manager is not adverse to the others, unless there are circumstances to show that they accepted the *seer* lands

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Alienation and adverse possession.

[1] Radhabai *v.* Ramchundra, I. L. R., 9 Bom., 198, at pp. 211, 212, 224, 225, 231. The possession of a *trespasser* should be distinguished from the possession of an *alienee* or *transferee*. If the predecessor's transfer is valid for his life, the successor's cause of action against the transferee does not accrue until the death of the former. (See Jamal *v.* Murgaya, I. L. R., 10 Bom., 34; Krishnaji *v.* Vithalrav, I. L. R., 12 Bom., 80). As to *repudiation* of office by a predecessor in office, see note 8, p. 146, *supra*. As to decrees against a predecessor in office, see p. 148, *supra*. As to the distinction between the *defacto* holder and the *dejure* holder of an office in cases of debts incurred by them, see Saminath *v.* Puroshottam, I. L. R., 16 Mad., 67. But the possession of even a *transferee* of the managing member of a Mitakshara joint family is, from its commencement, *adverse* to the other members because the transfer, if invalid, is invalid *ab initio*. (See Madhava *v.* Narayan, I. L. R., 9 Mad., 244).

As to *alienation* by the presiding priest of a *math*, see Jamal *v.* Murgaya, I. L. R., 10 Bom., 34. As to *sebaits*, see Kissenmul *v.* Nursingh, Marsh, 485. As to *mutwullees* of Wuqf property, see Shaikh Laul Mahomed *v.* Lalla Brijokishore, 17 W. R., 430.

Where a member of the family of the original manager of an endowment succeeds to the management *per formam doni*, he (the successor) may sue to recover the management of the property, although the original manager's right was *sold* in execution more than a year ago—Trimbak *v.* Narayan, I. L. R., 7 Bom., 188. See notes to art. 12, Sched. II, Act XV.

Where *two* persons jointly represent the estate for the time being, possession, even under an *alienation* by *one*, may be adverse to the *other*. If the possession of such alienee is inconsistent with the title of the *other* person, and he has a cause of action against the alienee, the possession may be adverse to him and every other person representing the estate, not being the alienor himself. See note 8, *supra*.

[2] Jowla Bux *v.* Dharum Sing, 10 Moo. I. A., 511. The general rule does not also apply where there has been an award of partition. Burjeet *v.* Goberdhone, 20 W. R., 25, P. C.

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in lieu of the shares they would have been entitled to on partition.[1] Where one member of a family is in receipt of the rents of one part of an estate, and another in receipt of the rents of another part of the estate, and they have afterwards to account to each other in respect of the excess of receipts over their respective rights, the possession of the one cannot be adverse to the other.[2] If the rents and profits of the estate which the members respectively hold are brought into the common fund, and they participate in this fund by reason of their living in commensality, there will be no adverse possession.[3]

Possession of other co-owners.

Many acts which would be clearly *adverse*, and might amount to dispossession as between the true owner and a *stranger*, would between co-owners naturally bear a different construction.[4] The mere fact that plaintiff's co-sharer was in possession of a certain plot of land, and the plaintiff not in actual possession of any part of it, would not constitute adverse possession. The possession would not be adverse until the plaintiff claimed or asserted some right in the land, and that right was denied by his co-sharer.[5] It might be adverse if the exclusive possession could not be accounted for by the fact of some arrangement having been come to at a previous time, between the co-sharers.[6] In *Ram*

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[1] Runjit Sing *v.* Kooer Gujraj, L. R., 1 I. A., 9.

[2] Chund Huree *v.* Rajah Norendro, 19 W. R., 231, P. C.

Commensality how far evidence of joint possession.

[3] *Per* Sir Barnes Peacock in Luchman Sing *v.* Shumshere, 14 B. L. R., 373, P. C.; also see 3 Mad., 99, Gobinda Pillai, appellant; and Lukshman Dada *v.* Ramchandra Dada, 7 C. L. R., 320, P. C.; (S. C.) I. L. R., 5 Bom., 48, P. C. The plaintiff's mother's mother lived and was *maintained as a member of the joint family* by her husband's brother's sons. The *presumption* was that the plaintiff's grandmother participated in the profits of the joint estate as a sharer. (Amrita Lall *v.* Rajoneekant, 23 W. R., 214, P. C. See also Moonshee Sirdar *v.* Molungo Sirdar, 24 W. R., 1). Living in the family-house, though not in the same apartments with the plaintiff's cousin, does not establish joint possession of the family estate, and the receipt by plaintiff of a small allowance per mensem or per annum goes some way to negative it. (Roghoonath *v.* Maharaj, I. L. R., 11 Calc., 777, at p. 784, P. C.) Occasional residence of the plaintiff or his wife with the co-owner, at the expense of the latter, may prevent the operation of limitation—see Kane Bable *v.* Antapji, I. L. R., 11 Bom., 455; Lukheemonee *v.* Brojo Bullub, 11 W. R., 132; *Contra*, Krishnadhun *v.* Sreemutty Hur Coomary, 25 W. R., 37. The defendant's admission that plaintiff received food and clothing from him does not necessarily show that the family estate was held as joint property. (Hardeo Bux *v.* Jowahir, I. L. R., 3 Calc., 522, at p. 537, P. C.)

[4] Ali Khan Mahomed *v.* Khajah Abdul, I. L. R., 9 Calc., 744, F. B.

[5] Shurfunnissa *v.* Kylas, 25 W. R., 53; Jardine *v.* Ranee Shama, 3 W. R., 144.

[6] Sheikh Asud *v.* Sheikh Akbar, 1 C. L. R., 364. Exclusive possession of a plot of a common dwelling-house by one member of a

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Ouster of co-owners by each other.

Chand v. *Watson*, I. L. R., 15 Calc., 214, Wilson and O'Kinealy, JJ., held that the mere cultivation of a part of the joint lands by one co-owner is not necessarily an ouster of the other owner, that if the latter is excluded in fact, and the former sets up a title in himself to do so, there is an ouster, and that if he sets up the case that as a fractional shareholder, he is entitled to cultivate the land exclusively, and to say to the other owner, 'you are not to interfere with these lands, you may, if you like, enjoy other lands for your share,' there is an absolute and complete ouster of the latter. But their Lordships of the Privy Council, on appeal, held that the latter portion of this ruling of the Calcutta High Court was erroneous, that so long as the co-owner in possession excludes the other co-owner, *not in denial of the latter's title*, but simply with the object of protecting himself in the profitable enjoyment of a part of the joint lands, it cannot be said that the latter co-owner has been ousted and that the latter co-owner is not entitled even to an injunction restraining the former from excluding the latter from his enjoyment of the *joint possession* of the lands. Their Lordships further observed that the Courts in India should be *very cautious* of *interfering* with the enjoyment of joint estates as *between their co-owners*, though they might do so in proper cases.[a]

Possession how far evidence of title.

Possession, though held for a term *less* than the period of limitation, is a good title against all persons except the *rightful* owner, and entitles the possessor to maintain eject-

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Hindu family, in the absence of proof of partition, must be referred to the continuing *consent* of his co-sharers. (Sheo Pershad Sing v. Leelah Sing, 20 W. R., 160). Exclusive possession of different plots of land by different co-sharers may be referred to a *tacit agreement* between the coparceners, and is no bar to a partition of the whole. Yusaf Ali *v.* Chubbee, 5 N. W. P., 122 (1873). As to when a private arrangement amounts to a partition and bars a regular partition or redistribution, see Hridoy *v.* Mohobutnissa, I. L. R., 30 Calc., 285.

The onus is on the *defendant* to prove that his possession is adverse to his co-sharer—Rakhaldoss *v.* Indrumonee, 1 C. L. R., 155, see note (7), *supra*.

[a] Watson *v.* Ramchand, I. L. R., 18 Calc., 10, P. C.; Lachmeswar Sing *v.* Manowar, I. L. R., 19 Calc., 253, P. C. In the first case, the defendants earned some profits *by the exclusion* of the plaintiffs from possession, and their Lordships gave the plaintiffs a decree for *compensation* in respect of the exclusive use and benefit by the defendants of the disputed part of the joint lands. In the second case the plaintiffs lost nothing by the defendant's act of setting up a ferry on a part of the joint property, were not excluded from using the ferry, and had in fact, by gratuitous user thereof, received some substantial convenience from the defendant's acts. The plaintiffs in the second case were, therefore, not allowed any compensation in respect of the profits reaped by the defendant. See pp. 132, 133, *supra*.

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ment against any *other* person who dispossesses him.[9] If a plaintiff proves that he had possession, and that that possession has been forcibly or fraudulently disturbed by the defendant, he makes out a *primâ facie* title, which it is for the defendant to rebut.[10] But where the defendant's possession is *not* shown to have commenced in *wrong*, he cannot be ejected except on proof of a superior title.[1]

Prior possession (for less than 12 years), a title against all but the true owner.

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[9] Pemraj *v.* Narain, I. L. R., 6 Bom., 215; Brown, 125. The import of the authorities (Armory *v.* Delamirie, 1 Smith's L. C., 6th Ed., 313; Asher *v.* Whitlock, L. R., 1 Q. B., 1) is correctly stated by Petheram, C. J., where he says: "Possession is a good title against all the world except the person who can show a better title." (See Sunder *v.* Parbati, I. L. R., 12 All., 51, at p. 54, P. C.) Patterson, J., in Doe d. Carter *v.* Barnard, 13 Q. B., 945, says that possession alone is not sufficient in ejectment (as it is in trespass) to maintain the action, but that it is *primâ facie* evidence of title. It has been held that where there are no alternative claims of title, where the plaintiff's prior possession is referable to an alleged *specific title*, and to that *alone*, and the specific title is disproved, "the possession avails nothing." (See Rajah Haimun *v.* Koomar Gunsheam, 5 W. R., P. C., 69). In this case the plaintiff sued to recover possession, but failed to prove his allegation that the defendant had *fraudulently* acquired possession. His alleged *title* as the adopted son of the defendant's husband was also disproved. Assuming that plaintiff's *prior* possession for a number of years was proved, their Lordships of the Privy Council said: "It is perfectly clear, upon the plaintiff's own showing, that such possession is referable to his alleged title by adoption, and to that *alone*. If there was no title by adoption, the possession avails nothing." This, moreover, was not a case of *wrongful dispossession*. (See 8 W. R., 386, at p. 389). The defendant as widow of the late proprietor entered into possession under a subsequent settlement obtained from the lawful Revenue Authorities, and as her possession was not proved to have "commenced in wrong," the plaintiff was not allowed to contend that his "prior possession" alone entitled him to disturb the defendant's possession without proving distinctly a superior title. (See 25 W. R., 81, P. C.)

Mere possession not good against holder of *better title*.

Of no use, where plaintiff alleges a single title, and that is disproved.

Nor where defendant's possession did not commence in *wrong*.

Possession for the *full* period of limitation gives a title against *all* the world *including* the true owner.[a] In suits for ejectment, possession for a *shorter* period is evidence of title against all *except* the true owner. Such shorter possession is sufficient to maintain a *summary* possessory action under Act I of 1877, against a stranger *as well as* against the true owner.

Possession, (1) for full period; (2) for shorter period.

Even evidence of *subsequent* possession is good evidence upon the question of parcel or no parcel at a *previous* date. In the absence of evidence to the contrary *presumitur retro*. Ananga *v.* Tripura, I. L. R., 14 Calc., 740, 748, P. C.

Parcel or no parcel. *Presumitur retro.*

[10] Ayesha *v.* Kanye, 12 W. R., 146; Trilochun *v.* Koylas, 12 W. R., 175. A person shows a better title if he proves that he or his predecessor had *earlier possession* of which he was *wrongfully deprived*. (Williams' Real Property, 17th Ed., p. 531).

[a] Arunugan *v.* Perriyannan, 25 W. R., 81, P. C. Where the ouster is shown to be *wrongful*, and the defendant's title is not proved, he cannot take advantage of his own wrong in order to shift the burden of proof upon the plaintiff. (Brojo Sunder *v.* Koilas Chunder, 11 C. L. R., 133). In such a case the defendant should not be allowed to defend himself by showing a better title than the plaintiff's, in some *third* person through or under whom he himself does not claim the property, or justify the trespass. See text, and note 9, p. 164, *infra*.

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Effect of sec. 9, Act I of 1877.

Section 9 of the Specific Relief Act, I of 1877, (corresponding to sec. 15, Act XIV of 1859) does *not* say that a person illegally dispossessed shall not be entitled to recover, notwithstanding that the defendant has failed to prove any other title, if the suit has not been brought within six months from the date of dispossession. The object of this section appears to have been to give a *special* remedy to the party illegally dispossessed by depriving the dispossessor of the privilege of proving a better *title* to the land in dispute. A mere wrong-doer has no right to complain that the party wronged by him has not availed himself of the *summary* remedy laid down in this section.[2] But it has been held in some cases[3] that the mere proof of previous possession on the part of the plaintiff (for a time less than the period of limitation) will not entitle him to recover the property, if he has failed to sue within six months under

Mere prior possession. Conflict of opinion.

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[2] *Per* D. Mitter, J., in Khajah Enaitullah *v.* Kishen Soonder, 8 W. R., 386, at pp. 389, 390; Mohabeer Pershad *v.* Mohabeer Sing, I. L. R., 7 Calc., 591, 593. The object of the section appears to be to discourage people from taking the law into their own hands, however good their title may be, and the mere omission of the party dispossessed to avail himself of the summary remedy cannot amount to acquiescence in the act of the dispossession, so as to deprive him of his right to rely on his previous possession in an action of ejectment against a trespasser. (Per Sargent, C. J., in Krishnarav *v.* Vasudeb, I. L. R., 8 Bom., 371). "Section 9 of the Specific Relief Act was passed in order to prevent persons ousting a man from possession except by due process of law, and it was intended that under that section a suit might be brought within six months, and the person ousted be put into possession, no matter what title he had. It was a section the object of which was to drive persons who wanted to eject a person into the proper Court and prevent them from going with a high hand and ejecting such person. That section has nothing to do with a suit on title for possession." Per Edge, C. J., in Wali Ahmed *v.* Ajudhia, I. L. R., 13 All., 537, at p. 558. Sec. 9 provides a summary and speedy remedy for the restoration of possession. The object is to prevent an intruder who has forced himself into possession from snapping his fingers and saying "here I am in possession, prove your title, and do your worst." Per Straight, J., *ibid.*, p. 562.

Mitter, J., Sargent, C. J., Edge, C. J., and Straight, J., on sec. 9.

[3] Dadabhai *v.* Sub-Collector, 7 Bom., 82; Debi Churn *v.* Isher Chunder, I. L. R., 9 Calc., 39; Ertaza Hossein *v.* Bany Mistry, I. L. R., 9 Calc., 130. See also the judgment of Mahmud, J., in Wali Ahmad *v.* Ajudhia, I. L. R., 13 All., 537. In Kawa *v.* Khoaz, 5 C. L. R., 278, Mr. Justice Morris held that prior possession was *prima facie* evidence of title in a title-suit. But Mr. Justice Prinsep was of opinion that such possession was no evidence of title except in a possessory suit under the Specific Relief Act. In Purmesher *v.* Brijolal, I. L. R., 17 Calc., 256, Mr. Justice Pigot appears to be of the same opinion with Mitter, J. (8 W. R., 386); Morris, J. (5 C. L. R., 278); Garth, C. J. (I. L. R., 7 Calc., 591); Westropp, C. J. (I. L. R., 6 Bom., 215), and Sargent, C. J. (I. L. R., 8 Bom., 371); but the learned Judge follows the rulings in I. L. R., 9 Calc., because they are the more recent decisions of the Calcutta Court on this subject. Edge, C. J., Straight and Tyrell, JJ., agree in the view taken by Mitter, J. (See I. L. R., 13 All., 537, F. B.)

Conflict of opinion as to the value of mere prior possession in title-suits.

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the section in question. The better opinion, however, seems to be that mere possession (though for *less* than twelve years) is *primâ facie* or presumptive evidence of title, and no other interest appearing in proof, evidence of seisin in fee[4]; and this is so even where the plaintiff does not sue within the time limited by sec. 9 of the Specific Relief Act.[5] This rule does not, of course, apply where it appears that the plaintiff has been evicted by the true owner[6] or by persons who had *prior* possession. And it has been already observed that this rule is inapplicable, where the defendant's possession is *not* shown to have commenced in *wrong*.

The better opinion.

Where the rule is inapplicable.

Again, even where the defendant has no title in himself, and is, *so far*, a mere wrong-doer, he may avail himself of the title of a *third* party, if it appears in the plaintiff's evidence.[7] The presumption that plaintiff's possession is referable to his title may, it is *said*, be rebutted if the evidence given by the *defendant* (or that given by the plaintiff himself) shows that "the title is *not* in the plaintiff."[8] In ejectment suits, where the plaintiff proves

Plea of *jus tertii*.

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[4] Roscoe's Digest (*nisi prius*), 14th Ed., p. 921; Doe d. Carter *v.* Barnard, 13 Q. B., 945; Markby, 3rd Ed., sec. 557; Jones *v.* Smith, and other cases cited in I. L. R., 6 Bom., 215, 222.

[5] Krishnarao *v.* Vasudeb, I. L. R., 8 Bom., 371; Pemraj *v.* Narain, I. L. R., 6 Bom., 215, F. B.; and the cases cited in note (2), *supra*.

[6] Wise *v.* Ameeroonnissa, 6 C. L. R., 249, as explained in Krishnarao *v.* Vasudeb, I. L. R., 8 Bom., 371. The reason why the rule was not applied in this case is that mere possession (for less than twelve years) is *not* evidence of title against the *true owner*. The finder of a jewel has such a qualified property in it as will enable him to *keep* it against all but the rightful owner, *and* therefore to maintain trover. (Armory *v.* Delamirie, 1 Smith's L. C., 6th Ed., 313). "I take it as clearly established that *possession* is good against all the world except the person who can show a *good title*." "Possession is good title against all but the true owner." (Per Cockburn, C. J., in Asher *v.* Whitlock, L. R., 1 Q. B., 1). "The fact of possession is *primâ facie* evidence of seisin in fee." (Per Miller, J., in the same case). It was held in this case that a person in possession of land without other title (and those claiming under him) can maintain ejectment against any person who has entered upon the land, and cannot connect himself with some one having *title*, or *possession prior* to the plaintiff. Where *A's* possession of the land was lawfully attained, that is, where his possession was not procured by force or fraud, but peaceably, no one interested opposing,—*A* is entitled to maintain his possession against all comers except those who can plead a preferable title. (Sunder *v.* Parbutty, I. L. R., 12 All., 51, at pp. 56, 57, P. C.) Some of the English authorites lay down these principles as applicable even to the case of *possession as a squatter*. See the remarks of Westropp, C. J., at p. 223 of I. L. R., 6 Bom. See also Leach *v.* Jay, 9 Ch. Div., 42, 44. But as to squatters who do *not* even impliedly *claim* to hold *adversely* to the true owner, see p. 128, *supra*, and p. 167, note, *infra*.

English and Privy Council rulings on the value of possession.

Title, or prior possession.

Squatter's possession.

[7] *Doe d.* Carter *v.* Barnard, 13 Q. B., 945, 953; 1 Mad., 85.

[8] Doe *v.* Kuppu, 1 Mad., 85, 89; Kali Chunder *v.* Adoo Shaikh, 9 W. R., 602; Nagle *v.* Shea, 8 Ir. R. C., 224, C. P. A defendant in

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that he has been *illegally dispossessed* by the defendant, the latter may be called upon to prove his title. If the defendant fails to prove his title, and no *jus tertii* is in evidence, the plaintiff will ordinarily be entitled to a decree. It is also *said* that if the *defendant* succeeds in proving a *primâ facie* title (in himself or) in *another*, the plaintiff should then be called upon to prove a better title.[a] This statement of the law (so far as the plea of *jus tertii* is concerned) is perhaps not quite accurate. Sir Frederick Pollock in his Essay on Possession in the Common Law of England (pp. 91, 92, 96, 97) observes that when the existing *possession* of the plaintiff has been wrongfully interfered with by the defendant, the *latter* can *not* defend himself by *showing* a better title than the plaintiff's, in some third person through or under whom he himself does not claim the property, or justify the trespass. But where the plaintiff has never been in possession, and he seeks redress *solely* for wrong done to his *right to possess*, i.e., if his *possession* has *not* been disturbed by the act complained of, he may be defeated by showing that some *third* party has a better right to possess. It seems to Sir Frederick that there is not any real authority for allowing a mere *wrong-doer* to set up an *extraneous* title paramount against a *possessory title*, prior to his own entry. The strongest case against this view is *Nagle* v. *Shea*, 1874, Ir. Rep., 8 C. L., 224, but the decision was not unanimous, and anyhow it cannot in an English Court outweigh *Daivison* v. *Gent*, 1857, 1 H. and N., 744. Sir Frederick Pollock (at pp. [illegible]

Pollock on the plea of *jus tertii*.

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possession may set up a *jus tertii* or any other sufficient ground to question the title of the party who is seeking to oust him from possession. Vellanki *v.* Venkata, I. L. R., 1 Mad., 174, at p. 185, P. C. In this last case the plaintiff had *never* been in possession of the property which he sued to recover. It was not a case of wrongful dispossession.

Two modes of rebutting the presumption.

The presumption of title arising from plaintiff's prior possession may be rebutted by showing that the defendant is the true owner, or that he had been in possession *before* the plaintiff, and that he has regained possession by evicting the plaintiff, who was only intermediately in possession. (Asher *v.* Whitlock, L. R., 1 Q. B., 1. Mere priority of possession is, at law, a sufficient proof of title against a subsequent trespasser. See Banning, 106; Darby and Bosanquet, 392.

No premium to violence.

[a] See notes 4, 5 and 8, *supra*. See also Jadub Nath *v.* Ramsoondur, 7 W. R., 174, as explained in Khajah Enaitulah *v.* Kishen Soonder, 8 W. R., 386, 389; Gour *v.* Wooma, 12 W. R., 472; Ayesha *v.* Kaulya, 12 W. R., 146. "It would be holding out a premium to violence and force if we were to hold that a man who has forcibly dispossessed another is entitled to say, when the dispossessed party sues to recover possession, that the burden of proving title is entirely upon the latter and not upon himself." Per Mitter, J., in Shama Soondaree *v.* The Collector, 12 W. R., 164. See also note 1, p. 161.

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and 97 of the Essay) nevertheless admits that a plaintiff in an action of ejectment, whose case would be good if he relied merely on his own *possession*, may spoil it if *he shows* the *badness* of his *own title* by setting out the previous history, and the learned author cites with approbation *Doe d. Carter* v. *Barnard*, 13 Q. B., 945. In this case the plaintiff's own evidence proved that an independent trespasser was in possession of the property *before* she took possession thereof. Her own possession was *primâ facie evidence* of title, but such evidence of her title was rebutted by the proof of a superior title in the person who held the possession *before* her. In *Gridhari Lall* v. *The Bengal Government*, 10 W. R., P. C., 31, (S. C.) 12 Moore's I. A., 448, and *Sivagnana* v. *Periasami*, I. L. R., 1 Mad., 312, their Lordships of the Privy Council held that, in actions of the nature of actions of *ejectment*, the *general* rule is that the plaintiff must recover on the strength of his own title, and not on the weakness of that of the person in possession, who can set up and rely on a *jus tertia*. In both these cases the plaintiff was *never in possession* of the property he claimed to recover. Where two persons, without title, jointly take possession of certain immoveable property, such possession not being procured by force or fraud, but peaceably, no one interested opposing their entry, they have a joint possessory interest or estate which may be the subject of a suit for *partition* between them. The true owner not being in the field, the defendant in *such* a *suit* can *not* set up the title of such owner and defeat the plaintiff's claim. (*Sundar* v. *Parbati*, I. L. R., 12 All., 51, P. C.)

P. C. Cases on the plea of *jus tertii*.

As to the effect of previous *possessory* awards by the revenue or criminal authorities, or by the Civil Courts in summary or miscellaneous proceedings, see the cases noted below.[10]

Summary orders as to possession.

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[10] As to when orders under sec. 246, Act VIII of 1859, or sec. 283, Act XIV of 1882, become *conclusive*, see Badri Prosad *v.* Muhammed, I. L. R., 1 All., 381, F. B., and Nilo *v.* Ràma, I. L. R., 9 Bom., 35 and note 10, p. 87, *supra*. But an order which is conclusive against *one* decreeholder is not conclusive against *another*, although the claimant is the same person in both cases. (Gnanambal *v.* Parvathi, I. L. R., 15 Mad., 477). An order under sec. 534 of the Criminal Procedure Code of 1872 and sec. 522 of the Code of 1882, restoring possession of immoveable property to a person who has been dispossessed of it by criminal force, or an order of the Mamlatdar in a possessory suit under Act III of 1876, is not conclusive as to the point of actual possession in any subsequent suit; such orders are *expressly* deprived of effect for the purpose of any ulterior proceedings on the question of possession. Lilloo bin *v.* Annaji, I. L. R., 5 Bom., 387, 392.

Effect of such orders when not set aside in time.

It has been held by Sargent, C. J., that an order of a Mamlatdar's Court (which is a Revenue Court) under sec. 1, cl. 2 of Act XVI of

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The interest of disseizors transmissible.

A person who has taken possession of land without title has, while he continues such possession, and even before the statutory period has elapsed, a transmissible, devisable, and inheritable interest in the property, though one which is liable at any moment to be defeated by the

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1838, was *conclusive* as to the successful party's right to possession, unless ejected by a decree of the Civil Court within three years of the order, under sec. 1, cl. 7, Act XIV of 1859. The ruling of the Allahabad High Court as to orders under sec. 246 of Act 8 of 1859 in Badri Prosad v. Muhammed, I. L. R., 1 All., 382, is considered applicable to such orders of the Mamlatdar. (Bapu v. Baji, I. L. R., 14 Bom., 372).

Effect of Magisterial orders as to possession.

An order under Act IV of 1840, sec. 318 of Act XXV of 1861, sec. 530 of Act X of 1872, or sec. 145 of Act X of 1882, is final on the question of possession. (Shib Chunder v. Modhoo, 1 W. R., 349, 350; Lilloo bin v. Annaji, I. L. R., 5 Bom., 387). If the party against whom the award or order is made peaceably obtains possession of the disputed land, he is not bound to bring a suit to set it aside. (Joogul Kishore v. Rajkishen, 3 W. R., 129). In an ordinary case in which the plaintiff comes to be relieved from the effect of a possessory order under Act IV of 1840, and to establish a title to land in the possession of which the defendant had thereby been put or maintained, it may be assumed that the defendant has from the date of the order remained in possession, and is still in possession. This assumption ought not to be made where a third party appears to have taken possession of the disputed land. (Shama Soondery v. Dukhina Mohun, 3 Shome's Report, p. 85 (1874), P. C.) In a regular suit instituted to set aside such a Magisterial order, within the period of limitation, the order as to possession is treated as some good evidence of possession and considered with the other evidence in the case. (See Runjeet Ram v. Goburdhan, 20 W. R., 25, at p. 29, P. C.) It has been held in Calcutta that if the party in whose favor the order was made loses his possession and sues to recover possession, the order is treated as only some evidence of plaintiff's possession at the date of the order, even if the opposite party did not sue to set aside the order within the three years allowed by the law of limitation. (See Joogul Kishore v. Raj Kishen, 3 W. R., 129). Their Lordships of the Privy Council also have held that as the Magistrate, under Act IV of 1840, had not to enquire into title, but merely to ascertain who was in possession *de facto*, and to retain him in possession, the mere fact that the unsuccessful party did not sue to set aside the Magistrate's order within three years could not establish the title of the other party, in a civil suit by the latter for the recovery of such property. (Wise v. Amirconissa, 6 C. L. R., 249, at p. 255). But the Bombay High Court, in Bapu v. Baji, I. L. R., 14 Bom., 372, appears to have held that in a similar case, an order under Act XVI of 1838 would be conclusive as to the successful party's right to possession, and that after the three years, the defendant would be precluded from asserting his title.

A plaintiff may recover property comprised in an award under sec. 530 of Act X of 1872 by proving a title by twelve years' adverse possession. (Goluck v. Nundo, I. L. R., 4 Calc., 699). It has been held that proof of previous possession for less than twelve years is not sufficient to set aside an Act IV award. (Shib Chunder v. Modhoosoodun, 1 W. R., 349). Where possession has been *delivered* to one of the parties by such an award, his possession *not having commenced in a wrong*, the opposite party cannot set aside the award by proof of mere previous possession. But where the award simply *maintains* the defendant in possession, it is apprehended that, on the principles laid down in

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entry of the rightful owner; and if such person be succeeded in the possession by one *claiming through him* who holds till the expiration of that period, such successor has then as good a right to the possession as if he had himself occupied for the whole period.[1]

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the text, the plaintiff may recover on proof of his undisturbed possession before the date of the award. An order under sec. 4, Act XIX of 1841, or an order under sec. 55 of the Bengal Land Registration Act, VII of 1876, determining summarily the *right* to possession, and *delivering* possession accordingly, is *conclusive* on the question of possession, but an order under sec. 52 of Bengal Act VII of 1876 is only some evidence of possession which the Civil Court is at liberty to consider along with other evidence in the case. (Omrunnissa *v.* Dilwar, I. L. R., 10 Calc., 350). As to the effect of certain other revenue awards, see Shunker *v.* Raja Ram, 4 W. R., 56, and Mohima Chunder *v.* Rajcoomar, 10 W. R., 22. As to the effect of summary awards generally, see pp. 86, 87, *supra*. Effect of *other* summary orders.

[1] *Per* Cockburn, C. J., in Asher *v.* Whitlock, L. R., 1 Q. B., 1; Darby and Bosanquet, p. 390; see also Brindabun *v.* Tarachand, 20 W. R., 114; and Gossain Dass *v.* Issur Chunder, I. L. R., 3 Calc., 224, 226; Pemraj *v.* Narayan, I. L. R., 6 Bom., 215, 222.

Such *inchoate* interest or estate if acquired by two persons *jointly* may, even before it is perfected by prescription, be the subject of a suit for *partition* between them. (I. L. R., 12 All., 51, at p. 57, P. C.) Disseizor's interest *partible*.

If a person wrongfully gets possession of the land of another, he becomes wrongfully entitled to an estate in fee-simple, and to *no less* estate, in that land. He is not a mere tenant-at-will, nor for years, nor for life, nor in tail. He acquires an estate in fee by wrong, which in time might *eventually* be turned into a rightful estate. (See the judgment of James, L. J., in Leach *v.* Jay, L. R., 9 Ch. Div., 42, at p. 44). This supposes that the person who gets possession, *claims* to be himself entitled *in fee*, or *does not set up any particular title*. Limitation while it cures the defect of title on the strength of which possession was maintained, cannot operate to give the holder a title which he never claimed. If a man claims an estate for life and that is consistent with his possession, the law will not, upon the mere fact of possession, adjudge him to be in under a *higher right*, or a *larger estate*. (Per Parker and Shephard, JJ., in 3 Mad. L. J., 100, at p. 104. See also Brown, pp. 76, 77, 126; Darby and Bosanquet, p. 394). The declarations of the party while in possession, equally with his acts, may prove the quality and extent of the interest claimed. (Brown, p. 126). The will or other instrument under which the possessor claims may also prove the same. (*Ibid.*, 77; p. 130, note, *supra*). But if a party be in possession *under a good title*, and by *mistake* of law he supposes himself possessed of a *less* estate in the land than really belongs to him, the law will nevertheless adjudge him in possession of his *full* right and title. (See Brown, p. 126).

He has an estate *in fee* by wrong.

A *less* estate, if he *claims* a less interest.

True owner though *claiming* a *less* estate has possession of *full* right.

The party in possession cannot prescribe contrary to the title on which he relies. His possession cannot be used for any other purpose than to explain the grant on which he relies. (Per Lord Watson in A. C. [1893], 104, at p. 107). If he discloses the true root of his title, there is no room for the application of the law of prescription. (Per Lord Hannen, at p. 122, *ibid.*) Similarly, it has been held that where possession is referable to an alleged specific title *alone*, and such title is disproved, long possession under a claim of that title avails nothing. (Rajah Haimun *v.* Koowar, 5 W. R., P. C., 69. See note 9, p. 161, *supra*.

Prescription inapplicable, where title is disclosed.

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Possession of purchaser, and of person whose rights are purchased.

It may be added that in the case of a sale out and out, if the vendor (whether or not he is the true owner of the land sold) remains in possession (after the transfer), his possession is adverse to the vendee.[2]

In 1845, *W* bought a certain property in execution of a decree against *Z*. In 1849, *B* purchased the rights and interests of *Z* (who had continued in possession notwithstanding *W's* purchase) and obtained possession of the property. *W* sued *B* for possession in 1861. *B*, claiming as he did under *Z*, was held to be entitled to add the period of *Z's* adverse possession to his own, and their united possession, which was adverse to *W*, was held to reach back to 1845, when *W's* right to sue first accrued.[3]

Written acknowledgment of disseizor does not affect *his transferee*.

The interest of the disseizor is liable to be defeated by his written acknowledgment of the title of the disseizee, at any time before the expiry of the period of limitation, and before the disseizor has transferred his possession to a third person by sale, lease, or mortgage. Before the prescribed period has expired, the disseizor may waive his own interest in the property.[4] But *after* he has *transferred* the property to a *bonâ fide* alienee, he cannot, either by waiver or acknowledgment, affect the latter. Even a decree for possession obtained by the owner against the disseizor does not put an end to the adverse possession of such an *alienee*.[5]

Even in the case of successive and independent trespassers, the rightful owner would be barred by limitation,

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[2] Tew *v.* Jones, 13 M. & W., 12; Anand *v.* Ali Jamin, I. L. R., 11 Calc., 229, 231.

[3] Woomachurn *v.* Rance Mohamoya, Gap No. W. R., 130. See also Angell, para. 440, note.

[4] Brown, 580; Angell, sec. 384, note. The plea of limitation cannot be waived in British India. A *written* acknowledgment is necessary here. When the inchoate interest of the trespasser is *perfected* by the expiry of the period of limitation, he may, of course, *re-transfer* the interest so acquired, by prescription. See note 7, p. 35, *supra*. It may be observed that the term "disseizor" is here used as an equivalent of the term "dispossessor." Disseisin, in English law has, or, at least, had a technical meaning.

Disseizor and Dispossessor.

Possession under a putni-lease granted by (1) a disseizor, (2) a mortgagor.

[5] *A*, while in adverse possession of *B's* land, let it in putni to *C*. Subsequently *B* sued and obtained a decree for possession against *A*, and then attempted to turn *C* out of possession. Between the date on which *A* took adverse possession of the land and the date on which *B* attempted to turn *C* out of possession more than twelve years had elapsed, and it was held that *B's* claim against *C* was barred by limitation. (Mohendro *v.* Nuffur, 1 C. L. R., 537). But where a putni was granted to *C* by the *owner* of the land after he had *mortgaged* the same to B, a suit by *B* or his representative (after foreclosure or sale) for *khas* possession against *C* is not barred by *C's* possession for twelve years as putni-tenant. (Kasumunnissa *v.* Nilratna, I. L. R., 8 Calc., 79).

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if the event from which limitation runs occurred twelve years before the date of suit, and his case did not come under any of the exceptions allowed by the law.[6] It has been said that as each independent trespasser comes into possession *without privity* with his predecessor, and as successive possessions by such trespassers cannot be tacked, the entry of each trespasser is a fresh trespass for which a new cause of action accrues to the lawful owner.[6a] But under art. 142 of Act XV of 1877, the period of limitation must be computed from the date of the plaintiff's dispossession or discontinuance of possession. If the first trespasser does not abandon his possession, and if there is no interval of time during which the lawful owner may be *deemed* to have been restored to possession, he is continuously out of possession, and can have no fresh start simply because a second trespasser dispossesses the first.[6b]

Case of successive trespassers under art. 142.

Owner being continuously out of possession.

The question whether the right extinguished by limitation is transferred to the first or the last of the trespassers will be noticed elsewhere.[7]

In cases falling under art. 144 of sched. II, Act XV of 1877, that is, in cases where the suit is for possession of immoveable property, or any interest therein, and is *not specially* provided for by art. 142 or any other article, the plaintiff may not be barred, although he, or the person under whom he claims, has not been in possession within twelve years of the institution of the suit.[7a] The defendant cannot add to his own possession the possession of any other person unless he *claims under* that other person. If the property has been successively in the possession of two persons, not claiming one under the other, the possession of one cannot be tacked

Different rule under art. 144.

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[6] Banning, p. 106; Darby and Bosanquet, p. 391. For a case where this rule *seems*, at first sight, to have been violated, see Agency Company *v.* Short, 13 App. Cas., 793. In this case, the first trespasser *abandoned* his possession *before* the expiry of the full period of limitation, and the true owner was, in the eye of law, *restored* to possession. The entry of the second trespasser was, therefore, a *fresh dispossession* and a *fresh* cause of action. The true owner was accordingly allowed to compute the period of limitation from the date of the entry of the second trespasser. See pp. 107, 115, *supra*.

Where dispossession, *not* continuous.

[6a] See Buswell, p. 334.

[6b] See Agency Company *v.* Short, 13 App. Cas., 793; and pp. 107, 115, *supra*. In the theoretically possible case of a series of changes of possession by *independent* trespasses, it would seem that every *successive* wrong-doer is a *trespasser only* as against his *immediate* predecessor, whose *de facto* possession he disturbed. (Pollock on Torts, 3rd Ed., p. 327).

Where dispossession is *continuous*.

[7] See Lecture XI, and the speech of the Law Member in the Legislative Council on the 19th July 1877.

[7a] Even if *continuously* out of possession for 12 years. See p. 109, *supra*.

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to the possession of the other, and, if the *defendant*[8] has not held adverse possession of the property for twelve years, he cannot, in cases under art. 144, successfully plead limitation.

Effect of attachments by the Collector.

Where the Collector attaches an estate for the purpose of realizing the Government revenue due from it, and after some time makes over the surplus collections for that period to the first of the two parties claiming the estate, the possession of the Collector *during the attachment* is not adverse to the second more than to the first, and *cannot* be *added* to the subsequent possession of the first party under art. 145 of Act IX of 1871, or art. 144 of Act XV of 1877.[9] The estate when set free by the Collector becomes then, and not till then, available as an object of possession, and therefore of adverse possession to one of the claimants as against the other.[10]

By Civil or Criminal Court.

Mere attachment, in execution of a decree, or in accordance with the provisions of Act IV of 1840, or the corresponding provisions of the Criminal Procedure Code, does not in any way change the possession of the property so as to bring the owner's case within the law of limitation.[1] When possession of attached property is delivered to the defendant, then, and then only, does his possession become adverse to the plaintiff. If plaintiff was in actual possession before the attachment, and the property is subsequently ordered to be released to him, he may be considered to have been in *constructive* possession of the same during the subsistence of the attachment.[2]

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[8] The word "defendant" in art. 144 of Act XV includes a person *from or through* whom a defendant *derives* his liability to be sued (See sec. 3, Act XV). Art. 145 of Act IX expressly mentioned "the possession of the defendant *or of some person through whom he claims.*"

[9] Because such party does not claim *under* or *through* the Collector. See Karan Sing *v.* Bakar Ali, I. L. R., 5 All., 1 P. C., and p. 100, *supra.*

[10] Shivram *v.* Secretary of State, I. L. R., 11 Bom., 222, at p. 232. For an instance in which Government took possession *on account of an unascertained owner*, see Tukram *v.* Sujan, I. L. R., 8 Bom., 369. These cases do not apply where the Government seizes the property *as its own* and refuses to restore possession though its own officers decide against its own claims. (I. L. R., 11 Bom., 222).

Possession of self-constituted agent.

The possession of an estate by a self-constituted agent for an unascertained owner is not adverse to such owner when he is ascertained, provided he adopts and ratifies the acts of such agent within a reasonable time of such ascertainment. Lyell *v.* Kennedy, 14 App. Cas., 437 ; note 4*a*, p. 110, *supra* ; and Lecture X.

[1] See Malraja *v.* Narayansamy, 4 Mad., 281 ; Bhaguruttee *v.* Grees Chunder, 2 Hay, 541, 544 ; Calc. Sud. Dwn. Rep., 1857, p. 447. See also Narayan *v.* Balkrishna, I. L. R., 4 Bom., 529, F. B.

[2] Rambhat *v.* The Collector, I. L. R., 1 Bom., 592.

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When a Civil Court appoints a receiver, and the receiver is in possession, his possession is the possession of the Court and may not be disturbed without the leave of the Court.[2a] Receiver's possession.

The possession of a receiver appointed by *interlocutory* order does not alter the rights of the parties as regard the Statute of Limitation.[2b] The appointment of such a receiver will not prevent the operation of the statute against the rightful owner if he is out of possession and not a party to the suit, or interrupt the possession of a stranger so as to prevent the Statute of Limitation conferring a title on him. The possession of the Court by its receiver is the possession of all parties to the suit according to their titles. The receiver is not the particular agent of any party, he is an officer of the Court and the common agent of all parties who are interested, *i.e.*, who, in the result of the decision, should prove to be parties really interested.[2c]

When the Court at the instance of a trustee takes possession of the trust property by its receiver, it cannot keep it for itself, and if it has to determine who is the person entitled to the property, the statute, although it imposes a bar to a *suit* to recover possession after twelve years, imposes no bar to the *Court declaring* who is beneficially entitled to the property in the *possession of the Court itself*.[2d]

The temporary possession of property under an erroneous order of the Magistrate, when such order has been subsequently reversed, does not benefit the plaintiff if he was out of possession at and before the date of that order.[3] When Dispossession under orders which have been *reversed*.

[2a] Angel *v.* Smith, 9 Ves., 335 ; Kerr, 3rd Ed., p. 139.

[2b] Harrisson *v.* Duignan, 2 Dru. and War., 295 ; Brown, p. 116.

[2c] Kerr, pp. 134, 135. See note 10 *supra*.

[2d] Dixon *v.* Gayfere, 23 L. J. Ch., 60 ; 17 Beav., 421 ; Brown, pp. 116, 275.

[3] Mooktokashee *v.* Ranee Lukhee, 1 Hay, 306.

A party who has acquired possession under a writ of possession which has been subsequently *set aside* as irregularly obtained, will be treated as a person who has abused the process of the Court, and will not probably be allowed to benefit by that possession. (*Per* West, J., in Lillu bin *v.* Annaji, I. L. R., 5 Bom., at p. 391).

It has been already observed that the rule in aid of *de facto* possession (referred to at p. 161, *supra*) does not help a claimant who was in possession but has been *dispossessed* in a *lawful manner*, and has not any *right* to possess. If the claimant's prior possession has been *divested* by *lawful authority*, *e.g.*, by a lawful order of the Magistrate, his *possessory* right can *not* be enforced. If the defendant has acquired possession under such an order or subsequently to it, he may in an action of ejectment against him set up an outstanding claim of a *third* party (*jus tertii* as it is called) and (the true owner not being in the field) retain possession against the claimant. (Pollock on Torts, 3rd Ed., p. 323 ; Buckley *v.* Gross, 32 L. J., Q. B., 129). See p. 166, *supra*. Effect of prior possession, if divested by *lawful* authority.

Jus tertii.

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Re-instatement after temporary dispossession.

the plaintiff forcibly dispossesses the defendant, and the defendant recovers possession under sec. 9 of the Specific Relief Act, *such temporary dispossession* does not amount to an interruption of the defendant's possession, or give the plaintiff a fresh start.[4]

If the auction-purchaser of an estate at a revenue sale, ousts the holder of an under-tenure, and the defaulting proprietor afterwards obtains a decree which sets aside the sale and restores him to possession, the under-tenant's right to be re-instated in his tenure accrues from the date of such decree.[5]

Act VIII of 1885, sec. 20, sub-section 6, enacts that, if a settled raiyat recovers possession of his land under sec. 87, he shall be deemed to have *continued* to be a settled raiyat, although he might have left his residence and been out of possession for more than a year.[6]

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[4] See Sir James Colvile's Amended Bill, sec. 6; Golam v. Bissonath, 12 W. R., 9; Premchand v. Hurree Dass, 22 W. R., 259; Kunhi v. Changaruchan, 2 Mad., 313. Section 9 of Act I of 1877 corresponds to sec. 15 of Act XIV of 1859.

[5] Ramdyal v. Rajah Ojoodhya, 25 W. R., 455.

[6] Recovery of possession by a raiyat after a wrongful eviction by the landlord entitles the raiyat to count the period of dispossession as a part of his continuous possession. Mahomed Gazee v. Noor Mahomed, 24 W. R., 324.

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LECTURE VII.

ON THE CONSTRUCTION OF STATUTES OF LIMITATION.

Remedial and penal statutes—Statutes of limitation, remedial or penal?—Statutes of limitation construed with reasonable strictness—Difference between strict and liberal construction, narrowed in modern times—Equitable construction not allowed—Statutes of limitation generally construed according to their plain meaning—Interpretation, strict and liberal, grammatical and logical—Modern rule of interpretation—Exceptions—"*Other* cause" in sec. 14, Act XIV of 1859—Technical words—"May"—"And"—"Or"—Context—The title and preamble—Schedules—Interpretation clauses—Illustrations—How when the language is ambiguous—How when the language leads to absurdity or palpable injustice—Applied with stringency when the words are clear and precise—The reason of the law considered only when the words are ambiguous—Construed in favor of the suitor if ambiguous—Instances, art. 160, Act IX of 1871—Sec. 247, Act VIII of 1859—Art. 176, Act XV of 1877—Art. 171 and Art. 127 of Act XV of 1877—Sec. 1, cl. 7, Act XIV of 1859—Art. 11, Act XV of 1877—Sec. 29, Act VIII of 1869 (B.C.)—Statutory *exceptions* construed *liberally* in *favor* of the suitor when the words are not clear and precise—The rule as well as the exception applied with stringency when the words are clear and precise—Sec. 1, cl. 15, Act XIV of 1859—The plain meaning of words departed from in very exceptional cases—Instances, secs. 20 and 21 of Act XIV of 1859—Sec. 92, Act X of 1859, and sec. 58, Act VIII of 1869 (B.C.)—Art. 176, Act XV of 1877—Sec. 1, cl. 16, Act XIV of 1859—Sec. 19, Act XIV of 1859—Ordinary rules of interpretation—The true intention to be ascertained by legitimate means—What are or are *not* legitimate means—A statute is to be taken and interpreted as a whole: to be read in its natural and ordinary sense; to be taken together with laws *in pari materia*—The force of affirmative words—Construction of a term which occurs in several parts of the same Act—Construction put by contemporary lawyers—How intention is ascertained when language is equivocal—Imperative and directory enactments—What statutes do not embrace the Sovereign—Exceptions and separate provisos—Repealing a repealing Act—Time when a statute comes into force—Statutes are not presumed to be retrospective—They do not *primâ facie* affect past transactions or pending proceedings—The General Clauses Act, 1868—The word "from"—Construction of a general statute must be general—Customs do not override the law of limitation—Retrospective operation of laws—As affecting vested rights, or mere procedure—Postponement of the operation of a law—How far a law of limitation may be presumed to be retrospective—Abolition or introduction of *exceptions*, how far retrospective—The retrospective operation of Act XIV of 1859; of Act IX of 1871—Mohes Lall *v.* Sumput Koweri discussed—*Generalia specialibus non derogant*—Sec. 6, Act IX of 1871—Sec. 6, Act XV of 1877.

Remedial and penal statutes.

FOR purposes of construction,[1] remedial statutes, and those which concern the public good, are often distinguished

[1] The expression "construction," as applied to a *document* includes two things: first, the *meaning* of the words, and secondly, their *legal*

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from penal statutes, and statutes encroaching on rights or imposing burdens. The latter, it is said, should be construed strictly,[1a] and the former liberally,[2] that is, *ultra* but not *contra*, the strict letter. According to this distinction,

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Meaning, and legal effect of words—Fact and law.

effect or the effect which is to be given to them. The meaning of the words is a question of *fact* in all cases, whether we are dealing with a poem or a legal document. (See Chatenay *v.* Braz. Tel. Co., 1 Q. B. [1891] 79, at p. 85). The legal effect of the words is a question of law and must be ascertained by the Court in accordance with rules of construction which are a portion of the law. (*Ibid.* See also Odit-narain *v.* Maha Rajah, F. B. Hunooman Prosad's N. W. P. Reports, p. 52, at p. 65).

Words of *parties* and of the *Legislature.*

The rules of exposition as to grants and pleadings which depend on the words being those of *parties* (*e.g.*, the rule that words of parties in deeds or grants are taken most strongly against the grantor, &c.) do not apply to *statutes.* But certain fundamental rules founded upon the universal principles of criticism and the grammatical sense and meaning of words must be alike applicable to the exposition of instruments and to the construction of statutes. (Dwarris, 2nd Ed., pp. 550-552).

Language of statutes.

Sir Peter Benson Maxwell treats of the subject of the interpretation of statutes under two general heads: (1) What are the principles which govern the construction of the *language* of a statute; and (2) what are those which guide the interpreter in gathering the *intention* on those *incidental* points on which the Legislature is *necessarily presumed* to have one, but on which it has *not expressed any.*

Intention of Legislature on incidental points necessarily arising out of its enactments.

Under the 2nd head, it is observed that certain intentions are attributed to the Legislature, where it has expressed none, on questions necessarily arising out of its enactments. Thus an Act which declared an offence felony would *impliedly* give it all the incidents of felony. An Act which simply creates a corporation *impliedly* gives it the legal attributes of one, but no such attributes are implied when the body is created a corporation for certain *purposes only.* This *extension* of an enactment is confined to its *strictly necessary* incidents or legal consequences. Where an Act confers a jurisdiction, it impliedly grants also the power of doing all such acts, or employing such means as are essentially necessary to its execution. Where an inferior Court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is *impliedly* conveyed by the enactment. An Act which authorises the making of bye-laws impliedly authorises the annexation of a reasonable pecuniary penalty for their infringement, recoverable (in the absence of other provision) by action or distress. The concession of privileges or powers often carries with it certain implied exemptions and certain implied obligations. (Maxwell, 2nd Ed., pp. 428 *et seq.*)

Penalty, burden, taxation—strict. Jurisdiction—liberal.

[1a] A penal law, and specially one of so peculiar a character as that contained in sec. 9 of Bengal Reg. XV of 1793 (the repealed law against usury) is *not* one to be *extended* by construction. (Shah Mukhan Lall *v.* Babu Srikissen, 12 Moo. I. A., 157; 11 W. R., P. C., 19). A penal statute must be construed strictly (Queen-Empress *v.* Kola Lalung, I. L. R., 8 Calc., 214, 216), and as far as possible in favor of the subject. (Queen-Empress *v.* Narain, I. L. R., 9 All., 240, 243). Statutes imposing burdens upon the subject must in every case of doubt be interpreted in favor of the subject. While in cases of *taxation* everything is to receive a strict construction in favor of the subject, in questions of *jurisdiction* the presumption is in favor of giving jurisdiction to the highest Court. (*Per* Mahmud, J., in Amanat *v.* Bhajan, I. L. R., 8 All., 438, at p. 445).

[2] A remedial Act is construed liberally. (*In re* Gordon, 28 Beav., 5).

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exceptions in remedial statutes are construed strictly; and *exceptions* in restrictive statutes are construed liberally.[3]

Statutes of limitation remedial or penal?

In this respect, statutes of limitation have given rise to some conflict of opinion.[4] Some authorities would treat these statutes as belonging to the class of penal or restrictive statutes, and construe them strictly in favor of the suitor; while others would look upon them as statutes of repose on which the security of all men depend, and construe them liberally and beneficially so as to promote as completely as possible the suppression of the mischief intended to be remedied.[5] The policy of the statutes of limitation is certainly good, and should be encouraged; but as they are Acts which restrict or take away existing rights, they should be construed with *reasonable strictness*, so that they may not operate with *unnecessary stringency*.[6]

Statutes of limitation construed with reasonable strictness.

Difference between strict and liberal construction narrowed in modern times.

The tendency of modern decisions, upon the whole, is to narrow materially the difference between a strict and a liberal construction. Remedial statues are now construed with a *more strict* regard to the *language*, and penal statutes with a *more rational* regard to the manifest *aim and intention* of the Legislature, than formerly.[7] Mr. Justice Holloway

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[3] *Per* Blackburn, M. R., see Brown, 677; Maxwell, 348.

[4] See the opinions of Heath, J., and Mr. Sedgwicke on the one hand, and those of Dallas, C.J., and Story, J., on the other. Wilberforce on Statutes (1881), p. 232, refers to these opinions.

Sir P. B. Maxwell, on the authority of a judgment of Lord Cranworth (Roddam *v.* Morley, 1 De G. and J. I.), says that statutes of limitation are to be construed strictly, while provisions which give exceptions to the operation of such enactments are to be construed liberally. But Mr. Justice Mahmud, in Mangulal *v.* Kandhai, says that in cases of ambiguity, or indistinctness of meaning, the Indian Limitation Act should *not* be subjected to the rule of strict construction against its operation, and that exceptions to the operation of the Act, should *not* be construed liberally. (Mangulal *v.* Kandhai, I. L. R., 8 All., 475, 480, 482).

[5] Reasons of public policy having led to the enactment of the statute, a Court of law should not view it in an unfavorable light as an unjust and discreditable defence, but should give it such support as would make it—what it is intended emphatically to be—a statute of repose. (*Per* Justice Story, in Bell *v.* Morrison). See p. 75, *supra*.

[6] See the judgment of Kindersley, V. C., in Edmunds *v.* Waugh, L. R., 1 Eq., 421, referred to in Banning on Limitation, p. 5.

[7] Maxwell on the Interpretation of Statutes, p. 256. Remedial statutes are to be construed *more* liberally than penal statutes, and penal statutes are to be construed *more* strictly than remedial statutes. (See Wharton's Law Lexicon). A strict interpretation includes fewer particulars than a freer construction. (Kent's Commentaries, Lecture 20, p. 515).

Interpretation, strict and liberal.

A statute is construed strictly when it is not regarded as including anything which is not within its *letter* as well as its *spirit*, which is

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goes even further: "I wholly repudiate," says the learned Judge, "interpretations strict or liberal according to the object-matter of the law. A barbarous code of penal laws was the parent of those doctrines, and the reason disappearing, we see by no doubtful symptoms that the doctrine is disappearing too."[8]

Equitable construction not allowed.

The spurious principle of *equitable* construction (by which an unequivocal law was sometimes extended, *ex ratione legis*, to cases not covered by the express terms thereof) is now altogether disregarded[9] as regards the construction of modern[10] statutes, except those which are strictly in *pari materia* with one which has already received an equitable construction.

It has been held by their Lordships of the Privy Council[1] that statutes of limitation, *like all others*, ought to receive

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Strict.

not clearly and intelligibly described in the very *words* of the statute, as well as manifestly *intended* by the Legislature. When the words are *ambiguous*, they are construed in favor of the person who is to be affected by them. (Wilberforce, pp. 246—9. See also Queen-Empress *v.* Kola Lalung, I. L. R., 8 Calc., 214, 216).

Liberal.

A statute is interpreted *liberally* when the *meaning* of the law-giver is carried into more complete effect than a stricter interpretation would allow. (Kent's Commentaries, 8th Ed., Lecture 20, p. 515, note).

Grammatical. Logical.

Interpretation resting upon a mere study of the words used, has been called *grammatical* interpretation, and that resting upon any other method *logical* or rational. (See Amos on the Science of Law, p. 67).

[8] Syed Ali Saheb *v.* Zemindar of Salur, 3 Mad. H. C., 5. Nevertheless "it is unquestionably right," says Pollock, C. B., that the distinction should not be *altogether* erased from the judicial mind,"—Maxwell, p. 256.

Section 1045 of the New York Criminal Procedure Code and Article 4 of the Louisiana Penal Code *expressly* abrogate the rule of the Common law that penal statutes are to be construed strictly.

[9] Maxwell, p. 233. In Mohummud *v.* The Collector, 21 W. R., 318, the Privy Council refused to put an equitable construction on Act IX of 1859, sec. 20, which is a special law of limitation, without any *express* saving in favor of persons under disability. See also Beckford *v.* Wade, 11 Exch., 437; 17 Vesey, 92.

Modern rule of interpretation.

[10] In modern statutes it is often more difficult to find out the reason of the law and the intention of the Legislature. "In the case of modern popular legislation," says Professor Amos, "proceeding, as it does, through the medium of prolonged debate and of innumerable compromises and amendments on the original proposition, it must be doubtful from the very first whether the law passed could be said to contain in itself any one and self-consistent meaning at all." (The Science of Law, p. 69). And the modern (general) rule according to Bramwell, B., is, that statutes must be construed according to their plain meaning, neither adding to, nor subtracting from, them. See 4 Exch., N. S., 689, cited in Brown on Limitation, p. 675.

[1] Luchmeebux Roy *v.* Ranjit Ram Panday, 20 W. R., 375, P. C.

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such a construction as the language in its plain[2] meaning imports; that in construing these statutes the ordinary rules of interpretation must prevail; and that no equitable construction should be put upon them.

Statutes of limitation generally construed according to their plain meaning.

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[2] An exception to this general rule arises when a word, having a wide signification, is used in *company* with other words of less extensive import and which are in fact included in the general term. In such a case the general word is deemed to extend only to such matters or things as are *ejusdem generis* with those denoted by the other words. On this principle of "*noscitur a sociis*" (see Shidlingapa *v.* Karisbasapa, I. L. R., 11 Bom., 599, 601) the general term "other cause" in sec. 14, Act XIV of 1859, has been interpreted to mean a cause *of a like nature* as "defect of jurisdiction," which expression precedes that term.—Chander Madhub *v.* Bissessuree, 6 W. R., 184, F. B. The words "applications for which no period of limitation is provided elsewhere in this schedule or by the Code of Civil Procedure, sec. 230," in No. 178, Sched. II of Act XV of 1877, have, on a similar principle, been construed to refer to applications *ejusdem generis* with applications specified in the schedule. (Gobind *v.* Rungo, 6 C. L. R., 345, 348, S. C., I. L. R., 6 Calc., 60; *In re* Ishan Chunder Roy, 8 C. L. R., 52, S. C., I. L. R., 6 Calc., 707). But in the case of The Government of Bengal *v.* Shurruffutoonissa (3 W. R., P. C., 31, 32), with reference to the words "minority or other good and sufficient cause" which occur in Bengal Reg. III of 1793, sec. 14, their Lordships of the Privy Council say that "other good and sufficient cause" are words so comprehensive that they may possibly extend to anything that constitutes in the *ordinary* meaning of those words a good and sufficient cause. This was only an *obiter dictum*. It should, however, be remembered that the principle *noscitur a sociis* applies only where the specific words preceding the generic words are *all* of the *same nature*, and it is further subject to the proviso that there is nothing to indicate that a wider sense was intended. Gosvami *v.* B. Robb, I. L. R., 8 Bom., 399, 401.

Exception—Generic terms along with specific terms.

"*Other* cause" in sec. 14, Act XIV of 1859.

In Reg. III of 1793.

Proviso to exception.

Again, where a particular expression has, for a long time previously, acquired a special (technical) signification, that special sense (in the absence of a defining clause in the Act) may be attached to the expression without violating this general rule. Thus in Ruckmabye *v.* Mottichand (5 Moo. I. A., 234) the expression "beyond the seas" in 21st James I, c. 16, was construed, not literally, but as synonymous in legal import and effect with the words "out of the realm," or "out of the land," or "out of the territories." And in Moharana Futtehsangji *v.* Dessai Kullianraeji (21 W. R., 178, P. C.) their Lordships of the Privy Council approve of the Bombay High Court rulings, which lay down that the term "immoveable property" in Act XIV of 1859 includes hereditary offices in a Hindu community, when such offices are incapable of being held by any person *not* a *Hindu*, because such offices under Hindu texts and Bombay Reg. V of 1827 had been previously treated as immoveables. (See the Collector *v.* Krishnanath, I. L. R., 5 Bom., 322, where the Bombay cases and the Privy Council ruling are discussed). The rule laid down by the Bombay High Court is based on the *absence* of a definition of "immoveable property" in Act XIV of 1859. This definition is *now* supplied by Act I of 1868. The correctness of the ruling in Roghu *v.* Kasi, 13 C. L. R., 263 (which professes to follow the P. C. case) may, therefore, be questioned. See notes under Rule XVI, *infra*.

Another exception—Technical words.

To give effect to the intention of the Legislature, the word "may" in a statute is sometimes interpreted as equivalent to "must" or "shall," but in the absence of proof of the intention of the Legislature,

Other exceptions.

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Text and context.

In a case free from all reasonable doubt as to the meaning of the Legislature, the construction of an Act must be taken from the bare words of the Act. It is not for Judges to invent something which they do not meet with in the words of the text, aiding their construction of the text always, of course, by the context.[a] The Judge's duty

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it is construed in its natural and, therefore, in a permissive, and not in an obligatory, sense. (Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C.)

When "May" = "Must."

If a public officer is empowered to do an act for the benefit of persons who are specifically pointed out, and the conditions upon which they can call for its exercise are given, the power *must* be exercised. (*Per* Lord Cairns in Julius *v.* Lord Bishop of Oxford, 5 Appeal Cases, 214. See also Anund Chunder *v.* Punchoo Lall, 14 W. R., F. B., 33, 36; Kent's Commentaries, Lecture 20, p. 518, note; Reg *v.* Alloo, 3 Moo. I. A., 488; Shri Viswambhar *v.* Vasudeb, I. L. R., 13 Bom., 37, at p. 41).

"Or" = "And."

As to the substitution of "*or*" for "and," and *vice versa*, see Muttammal *v.* The Bank, I. L. R., 7 Mad., 115, 122.

"Or"—not always distributive.

It has been held by the Calcutta High Court that the word "or" in art. 147, Act XV of 1877 ("suit by a mortgagee for foreclosure *or* sale") should *not* be read in the *ordinary* distributive sense, as such reading leads to unreasonable conclusions. (Girwar Sing *v.* Thakur Narain, I. L. R., 14 Calc., 730, 737, F. B.)

[a] See Crawford *v.* Spooner, 4 Moo. I. A., 179.

Context (*i.e.*), parts that precede and follow.

The context and the purpose of the Act are important factors in determining the sense of particular words and giving them due effect. Shidlingapa *v.* Karisbasapa, I. L. R., 11 Bom., 599, 602. The "context" includes anything within the four corners of the Act. But the title, the preamble, the marginal notes, the illustrations, and the punctuation do not strictly form parts of the Act. According to Parliamentary practice, no amendments can be moved to marginal notes, stops, or title, as printed in the Bill. (See Roscoe's Digest, 14th Ed., p. 166; Maxwell, pp. 34-35; Kent's Commentaries, Lecture 20, p. 509; and The Collector *v.* Luckamoni, 21 W. R., 358, 360, P. C.)

The title and preamble.

The *enacting* portion of a statute is its most important part. The preamble and the title cannot cut down the clear and express provisions of the Act. (Kent's Commentaries, Lecture 20, p. 509; 2 Mad., 322; Sutton *v.* Sutton, 22 Ch. Div., 511, and Queen-Empress *v.* Inderjeet, I. L. R., 11 All., 262, at p. 266). The preamble may *perhaps* be resorted to in restraint of the generality of the enacting clause when it would be inconvenient if not restrained (Kent, 510), and it may certainly be resorted to, in explanation of the enacting clause, if it be *doubtful*. (Kent's Commentaries, Lecture 20, p. 510; Maxwell, p. 35, Kristo *v.* Brown, I. L. R., 14 Calc., 176, at p. 183). Accordingly, the preamble of Act XV of 1877, short as it is, was referred to by the Calcutta High Court in construing arts. 178 and 176, Sched. II, Act XV of 1877. (See Ishan Chunder Roy's case, 8 C. L. R., 52, S. C., I. L. R., 6 Calc., 707; and Roberts *v.* Harrison, 9 C. L. R., 209, 212, S. C., I. L. R., 7 Calc., 333). But when the words of the enacting clause are *clear* and *positive*, recourse must not be had to the preamble. (Kent's Commentaries, Lecture 20, p. 509). The title, when taken in connection with other parts, may assist in removing ambiguities where the intent is *not plain*. (*Ibid.*, p. 509. The title and the preamble of Act XIV of 1859 were referred to by Sir B. Peacock, C. J., in construing the ambiguous word "suit" in that Act. (Hurrochurn *v.* Soorodhonee, 9 W. R., 403, 404, 406, F. B.)

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is to say what the law is, not to make or give a new law. (*Jus dicere non dare*). To go beyond the words, where they are unequivocal and precise is to *legislate*, Interpreting —*not* law-making.

Headings of chapters and parts are often referred to as guides to the meaning of sections. (Krishnapa *v.* Panshapa, 6 Bom., 258, 260; Shah Mukhun *v.* Shah Koondun (P. C.) 15 B. L. R., 228, 234). Headings.

Marginal notes are not parts of the Act. They are, however, useful in assisting the reading of a section which is open to any doubt as to its meaning. (Lal Singh *v.* Kunjan, I. L. R., 4 All., 387, 402). Maxwell says, marginal notes and punctuation did not in former days appear on the rolls of Parliament. Now, both do appear on the rolls. But whether they are *now* to be taken as parts of the statute is a question which has been raised but not decided. According to a *dictum* of Jessel, M. R., they are now parts of the statute. (2 Ch. D., 525). But in Sutton *v.* Sutton, 22 Ch. D., 311, Jessel, M. R., admits that this dictum is based on *incorrect* assumptions. Marginal notes.

It is an error to rely on *punctuation* in construing Acts of the Legislature. (The Maharani of Burdwan *v.* Krishna Kamini, I. L. R., 14 Calc., 365, at p. 372, P. C.) Punctuation.

If a schedule appended to the statute and the enacting part are repugnant, the latter prevails over the former. (Maxwell on the Interpretation of Statutes, p. 48). It must, however, be noted that Sched. II of Act XV of 1877 (like that of Act IX of 1871) is an *important part* of the enactment. In Dhonessur Koer *v.* Roy Gooder Sahoy, I. L. R., 2 Calc., 336, 339, Sir Richard Garth, C. J., delivering the judgment of a Full Bench of the Calcutta High Court, says: "We are of opinion that the periods of limitation prescribed in the second Schedule of the Act of 1871 are to be computed subject to the provisions contained in the body of the Act. The Schedule forms *a part of the Act*, and must be read together with it for all purposes of construction." Schedules.

For the purpose of avoiding the necessity for undisciplined interpretation, the Indian Legislature very often make use of "interpretation clauses" and "illustrations." "Interpretation clauses," however, are not always strictly followed; a narrower or a more extended meaning is sometimes given to words defined by the Act. (Wilberforce, 298). Sir Robert Stuart, C. J., in Uda Begum *v.* Imamuddin (I. L. R., 2 All., 74, 86), lays down that definitions or interpretations of this kind, being necessarily of a very general nature, are controlled by subsequent and express provisions on the subject-matter of the same definitions, that they must yield to enactments of a special and precise nature, and that, like words in schedules, they should be received rather as general examples than as overruling provisions. The principle of this rule is recognised by the Legislature when (as in sec. 3, Act XV of 1877) they introduce their interpretation clauses with the proviso: "unless there be something repugnant in the subject or context." Although the effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places in the Act in which that word occurs, it is not the effect of an interpretation clause that the thing defined has annexed to it every incident which may seem to be attached to it by any *other* Act of the Legislature. (Umachurn *v.* Ajadannissa, I. L. R., 12 Calc., 430). Interpretation clauses.

When an interpretation clause enacts that a certain *term* used in the Act, "includes" so and so, the meaning is that the term retains its ordinary meaning, and the clause *enlarges* the meaning of the term, and makes it include matters which the ordinary meaning would not The word "includes."

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Omissions and mistakes.

not to *interpret*.[4] A *casus omissus*, or a mistake made by the framers of the statute, cannot be remedied by a Court of law; the statute must be construed literally as it stands. (*White* v. *Neaylon*, 11 App. Cas., 171). A case

include. Per Lord Esher in Rodger v. Harrison, 1 Q. B. [1893], p. 167. See Rule XVI, *infra*.

"Illustrations—how treated by the Courts."

"*Illustrations* are only intended to assist us in construing the language of the Act." (*Per* Couch, C. J., in Shaikh Omed v. Nidhee Ram, 22 W. R., 367). Where the language of the illustration is larger than the enacting portion of the section itself, the Court ought to construe the illustration strictly. (Peerun v. Field, 21 W. R., Cr. R., 66). Although the illustrations may serve to exemplify the meaning of the law, they ought never to be allowed to *control* the plain meaning of the section itself, and certainly they ought not to do so, when the effect would be to *curtail a right* which the section in its ordinary sense would confer. (*Per* Garth, C. J., in Koylas v. Puddo, 8 C. L. R., 281, 283; I. L. R., 7 Calc., 132). "These illustrations," says Sir R. Stuart, C. J., "although attached to, do not in legal strictness form part of, the Acts, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and in other respects they may be useful, provided they are correct." (Nanak Ram v. Mehin Lal, I. L. R., 1 All., 487, 495; see also Dubey v. Ganeshi, I. L. R., 1 All., 34, 36). "The illustrations to the Penal Code," say a Full Bench of the Bombay High Court, "rank as cases decided upon its provisions by the highest authority, but as every authority may sometimes err, we are justified in asking whether this may have happened in the present instances." (Reg v. Rahimat, I. L. R., 1 Bom., 147, 155). The definitions and enacting clauses contain the whole law. The illustrations make nothing law which would not be law without them. (Macaulay's letter to Lord Auckland, Stokes' Anglo-Indian Codes, Vol. I, p. XXV). But the Indian Legislature appear to consider these "illustrations" so far parts of the enactments themselves as to deem it necessary to *expressly repeal* them when required. (See, for an instance, the schedule of Act II of 1882. It repeals the first illustration of sec. 12, Act I of 1877). And these "illustrations" have been described as "not merely examples of the law in operation, but the law itself, showing by examples what it is." (See Stokes' Anglo-Indian Codes, Vol. I, p. 297).

How treated by the Legislature.

Expressed intention of Legislature.

[4] *Per* Tindal, C. J., in Hyde v. Johnson, 2 Bing., N. C., 776. See also Muhummud Bahadur v. The Collector, 21 W. R., 318, 320, P. C. "The office of a Court of Justice is to interpret the law and not to make it." (*Per* Lord Selborne in Bradlaugh v. Clark, 8 App. Cas., 354, at p. 361). "We have of course to ascertain and give effect to the intention of the Legislature; but that *intention must be found in the Act itself*." (*Per* Oldfield, J., in Lal Singh v. Kunjan, I. L. R., 4 All., 387, at p. 395. See also Jadu v. Kanizak, I. L. R., 8 All., 576, at p. 600). The question for the interpreter is not what the *Legislature* wished or meant, but what its *language* means. (Palmer v. Thatcher, 3 Q. B. D., 353; Coxhead v. Mullis, 3 C. P. D., 439; Maxwell, 2nd Ed., p. 7). The Court cannot act upon the supposed intention of the Legislature, *i.e.*, unless such intention has been carried into effect by the language used. If the *terms* of the statute are in any way inconsistent with the supposed intention, the Court cannot have regard to such intention. (Danford v. McAnulty, 8 App. Cas., 456, 460). The Court has to discover the intention *expressed* in the statute. *Ibid.*, p. 461.

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which has been omitted is *not* to be supplied merely because there seems no good reason why it should have been omitted, and the omission appears consequently to have been unintentional.[4a] The business of the interpreter is not to improve the statute; it is to expound it.[4b] A Court of law cannot go behind what has been done by the Legislature. If a mistake has been made, the Legislature alone can correct it. The Courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination. Even if it could be proved that the Legislature was deceived, it would not be competent for a Court of law to disregard its enactments. An absolute statement by the Legislature that there existed a particular tenure at a particular place, and that such tenure was to be changed into a tenure of another kind, precludes the Courts from finding that the particular tenure did not really exist at the particular place. (*Labarador Company* v. *The Queen* [1893], A. C., 104, at pp. 107, 123).

Omissions.

Mistakes.

Where the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges, who apply it, may suppose to have been the reasons for enacting it.[5]

Motives of parties.

Reasons of the law.

If, however, the terms of the law be of doubtful import, the reason of the law (*ratione legis*), its history (including the state of things at the time of its passing), and the clear enactments of other laws in *pari materia*, may be considered for the purpose of determining the true import.[6]

Construction, when the language is ambiguous.

Professor Amos, in his Science of Law (p. 67), observes that the process of investigating the intention and will of the Legislature must always commence, in the first instance, with an enquiry into the *words* used, and the meaning they were intended to bear.[6a] It is only (*a*) when the words are

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[4a] Maxwell, 2nd Ed., p. 17.

[4b] *Ibid.*, p. 7.

[5] Moonshi Buzlore Rahim *v.* Shumshonissa, 8 W. R., P. C., 3.

[6] See Austin's Jurisprudence, Vol. II, pp. 645, 649; Broom and Hadley's Commentaries, Vol. I, pp. 95 *et seq.*

[6a] The *first* and most elementary rule of construction is, that it is to be assumed that the *words and phrases* are used in their *technical* meaning if they have acquired one, and in their *popular* meaning if they have not, and that the phrases and sentences are to be construed according to the *rules of grammar*; and from this presumption it is not allowable to depart unless adequate grounds are found, either in the *context*, or in the *consequences* which would result from the *literal* construction, for concluding that that interpretation does not give the *real intention* of the Legislature. (Maxwell, 2nd Ed., p. 2). The rule of literal construction is thus confined to cases (*a*) where the language is precise and *capable* of but *one construction*, or (*b*) where

Literal construction.

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ambiguous, and the meaning, therefore, uncertain, or (*b*) when it is held undesirable, for some reason or other, to put the undoubted meaning upon the word, that other clues to the probable policy of the Legislature can be made available. Exception (*a*) has been already referred to. Exception (*b*) applies where the language of a statute in its plain meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some palpable absurdity or inconsistency, or to injustice and inconvenience. In such cases, Judges deviate a little from the literal meaning of the words, and, out of respect to the Legislature, put a reasonable construction upon them. They do so under the conviction that the Legislature could not possibly have intended what its words signify, and that a modification of the language is necessary to meet its presumable intention.[7] This (exceptional) rule, however, does not give any scope for *general* considerations of policy or convenience. The grammatical sense may be extended or abridged *so far* as is *necessary* to avoid the inconsistency and inconvenience, but *no further*.[8]

Construction, when the language leads to absurdity or palpable injustice.

A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where neither the context, nor the consequences to which the literal interpretation would lead, show that that interpretation does not express the real intention. It is another elementary rule, that a thing which is within the *letter* of a statute is not within the statute, unless it be also within the *meaning* of the Legislature, and the words, *if sufficiently flexible*, must be construed in the sense which, if *less correct grammatically*, is more in harmony with that *meaning*. (Maxwell, p. 24). The literal construction has, therefore, a *primâ facie* preference. To arrive at the real meaning it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope, and object. The true meaning of any passage is to be found not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances, which the Legislature had in view. (Maxwell, pp. 27, 28).

Construction according to *spirit*, real intention, or true meaning.

[7] Maxwell, p. 209; Ranchodas *v.* Ranchodas, I. L. R., 1 Bom., 581, 585; *In re* Ratansi, I. L. R., 2 Bom., 148, at p. 159; The Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C.; Rhedoy Krishna Ghosh *v.* Kailash Chandra Bose, 13 W. R., F. B., 3; (S. C.) 4 B. L. R., F. B., 82; Gureebulla Sircar *v.* Mohun Lall Saha, 8 C. L. R., 409; (S. C.) I. L. R., 7 Calc., 127. This last case has been overruled by a Full Bench of the Calcutta High Court, but the general principle remains intact. See Mamtazul *v.* Nirbai, 12 C. L. R., 318; I. L. R., 9 Calc., 711, F. B. See also Jadu *v.* Kanizak, I. L. R., 8 All., 576, at p. 600.

[8] Wilberforce, p. 115; Warburton *v.* Loveland, cited at p. 159, I. L. R., 2 Bom., and in Kent's Commentaries, Lecture 20, p. 512; Becke *v.* Smith, cited in Jadu *v.* Kanizak, I. L. R., 8 All., 576, at p. 600. See p. 190, *infra*.

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such a law has been adopted by the State, for reasons which justify the rule in the majority of cases, it must, if *unambiguous*, be applied with stringency; and no individual case to which those reasons are inapplicable can be excepted from its operation. The general good of the community requires that even a hard case should not be allowed to disturb the law.* The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot, on equitable grounds, enlarge[10] the time allowed by the law, postpone its operation,[1] or introduce exceptions not recognised by it.[2]

Law of limitation applied with stringency if unambiguous.

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* E. I. Co. *v.* Odit Churn Paul, 5 Moo. I. A., 43. Every case must be determined according to *law*, and not with reference to *hardship*. (*Per* Peacock, C. J., in Hurrochunder *v.* Soorodhonee, 9 W. R., 403, 410, F. B.) For, it is notorious that (supposed) hard cases have a tendency to make bad law, or, in other words, to produce erroneous decisions. (*Per* Westropp, C. J., *In re* Ratansi, I. L R., 2 Bom., 148, 179). But it must not be supposed that every decision which causes a hardship is necessarily good law. (*Per* Peacock, C. J., in Mahomed *v.* Assadunnissa, 9 W. R., 1, at p. 59, F. B.) "*Inconvenience* could not be allowed to affect our decision, if the law were *clear*, but it is a matter to be taken into consideration in determining what the law is." (Per Peacock, C. J., in Rajaram *v.* Luchmun, 8 W. R., 15, at p. 20, F. B.) Occasional inconvenience is not a ground for rejecting the *plain* construction of a section which aims at general benefit. (Haji Abdul *v.* Khoja, I. L. R., 11 Bom., 6, at p. 18). In construing a statute we must not look to cases of very rare and singular occurrence. (Hyde *v.* Johnson, 2 Bing., N. C., at p. 780; I. L. R., 17 Bom., p. 179).

Hard cases make bad law.

Statutes of limitation are in their nature *strict* and *inflexible* enactments. (Luchmeebux *v.* Runjit Ram, 20 W. R., 375, at p. 377, P. C.) The Court, however, is not authorised to make the terms of the Limitation Act more stringent against the suitor or applicant than they really are. (Gungamoni *v.* Shib Sunker, 3 C. L R., 430).

Limitation law, strict and inflexible.

[10] Kristo Komul Sing *v.* Hurree Sirdar, 13 W. R., F. B., 44; (S. C.) 4 B. L. R., F. B., 105; Rajkristo Roy *v.* Dinobondhu Surma, 3 W. R., S. C., 5 (F. B.)

[1] 2 Mad. H. C., 268.

[2] Beckford *v.* Wade, 17 Vesey, 92; 11 Exch., 437; Raja Icvara Das *v.* Richardson, 2 Mad. H. C., 84; Mahummud *v.* The Collector, 21 W. R., 318, 320, P. C.; Unnoda *v.* Kisto, 19 W. R., 5, P. C. In Prideaux *v.* Webber it was decided that a plaintiff was barred by time, although during the latter part of the six years the Courts were closed in consequence of the rebellion, and it was then impossible for the plaintiff to bring his action. (Darby and Bosanquet, p. 17). And in Rajkristo *v.* Dinobundhu (3 W. R., S. C., Ct. Ref., 5) it was held by a Full Bench of the Calcutta High Court that, under Act XIV of 1859, limitation barred a suit even if the prescribed period expired on a sunday, holiday, or *dies non*, and the suit was brought on the next open day. But in certain cases of *forfeiture of rights* arising from the non-deposit of money, within the time fixed by the law or by the Court under the direction of the law (see Beng. Reg. XVII of 1806, sec. 52 of Act VIII of 1869, B.C., and sec. 214 of the Civil Procedure Code), Judges have, on *equitable* grounds, *extended* the time and given relief against forfeiture by allowing the *deposit* to be made on the next open day. See Dabee Rawoot *v.* Heeramun, 8 W. R., 223, 225;

Equitable construction *not* allowed.

Certain exceptional cases.

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Law and its *reason.*

The maxim *cessante ratione legis cessat ipsa lex* applies solely to *precedents*, and does not apply to *statute* law. For the law, as a positive command of the Legislature, may continue to exist although its *ratio* or reason has ceased, or is inapplicable to particular cases. The rule to be observed is not the *ratio legis*, but the law itself.[3]

The reason of the law considered only when the words are ambiguous or capable of *two* constructions.

Where the language of the law is *ambiguous*, the theory of the law may be taken into consideration, in order to avoid a result which, according to that theory, would be extremely unjust. As a law of limitation is in general assumed to be based on the theory of *laches*, it has been held that the right of an owner who has *not* been guilty of *laches* is not barred or extinguished by limitation, if the *language* of the law is *fairly open* to a reasonable construction in his favor.[4] Thus the words "discontinuance of the *receipt of rent*" in the 3 and 4 Will. IV, c. 27, were, in consideration of this theory, held to apply only to cases where the owner neglected to enforce his remedies with the *knowledge* that the rent due to him has not been paid.

Hussan Ali *v.* Donzelle, I. L. R., 5 Calc., 906; Dabi Din *v.* Muhammad, I. L. R., 3 All., 850. In the first of these cases the Court was illegally and unexpectedly closed, and this was considered an additional reason for giving relief. Sec. 66, cl. 2, Act VIII of 1885, *expressly* the law *expressly* gives the Court the power to extend the time, on sufficient cause shown, see Narain Mundul *v.* Banee Madhub, 12 W. R., F. B., 21. For the present law, as to the filing of *suits*, *appeals*, and *applications* on the next open day, see sec. 5, Acts IX of 1871 and XV of 1877. The General Clauses Act, I of 1887, extends the principle of cl. I, sec. 5, Act XV of 1887 to *acts* to be done or *proceedings* to be taken within a time limited by any Act passed after the 14th January 1887. See notes under sec. 5, cl. 1, in the Appendix. The words "the applicant *shall* within six months *deposit*" the costs, &c., in sec. 602, Civil Procedure Code, have been held to be merely directory, and not imperative. Burjore *v.* Bhagana, I. L. R., 10 Calc., 557, P. C. As to furnishing *security* within such time as the Court directs under sec. 549, Civil Procedure Code, see Haideri *v.* E. I. R. Co., I. L. R., 1 All., 687; Shrajudin *v.* Krishna, I. L. R., 11 Mad., 190; Badri *v.* Sheo Koer, I. L. R., 11 Calc., 716. Cf. Suppu *v.* Govindacharyar, I. L. R., 11 Mad., 85, and Rajah *v.* Amir Hossein, I. L. R., 8 All., 315, P. C. In Badri Narain *v.* Sheo Koer, I. L. R., 17 Calc., 512, their Lordships of the Privy Council overruled some of these cases and held that under sec. 549 the High Court has power to *extend* the time for furnishing security, *after* as well as *before* the time first fixed has expired. Where a decree of a lower Court directs something to be done within a specified time, and such decree is confirmed in appeal, the time is counted from the date of the appellate decree. (Rupchand *v.* Shamshuljehan, I. L. R., 11 All., 346; Noor Ali *v.* Konimeah, I. L. R., 13 Calc., 13; Daulat *v.* Bhukan Das, I. L. R., 11 Bom., 172). The Court *executing* a decree for redemption cannot enlarge the time allowed by the decree, although an appeal from such decree has been lodged and is still pending (Mahant *v.* Chudasa, I. L. R., 13 Bom., 106).

Express provisions for extension.

Directory provisions as to *deposits* and *securities.*

Date of *decree* where there has been an *appeal.*

[3] Austin, Vol. II, 652.

[4] Adnam *v.* The Earl of Sandwich, 2 Q. B. Div., 485.

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and not to a case where the *original* tenant continued to pay the rent, although the tenure had been *transferred* to a stranger (without the knowledge of the owner), and such stranger urged that the owner's right to the rent was extinguished by reason of his not having received the rent from the *actual* tenant.[4a] But the words "dispossession" and "discontinuance of possession" in the same statute have been held not to be open to such a construction, and the owner's *ignorance* of the fact of dispossession is no bar to the operation of the statute.[5]

Construed *strictly*, in favor of the suitor, if ambiguous.

It has been already observed that as a general rule the language of an Act (especially if it is a modern Act) should be strictly construed.[6] This rule is, of course, applicable to statutes of limitation, which being restrictive of the ordinary right to take legal proceedings are so far *disabling* Acts. Before such a law is applied to any individual case, it must be clearly shown to come within some specific rule enacted by the law.[7] Where the law specifies the particular cases for which a particular period of limitation is provided, it ought not to be interpreted so as to include cases not within the strict meaning of the words used.[8] Where the law does not unequivocally and in precise language bar the proceedings, it is construed *in favor of the right to proceed*. The language of the law is not strained in order to take away from any one the rights which, but for it, he would possess.[9]

[4a] Adnam *v.* The Earl of Sandwich, 2 Q. B. Div., 485.

[5] Rains *v.* Buxton, 14 Ch. Div., 537. This ruling is applicable to the Indian law of limitation. See Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175, 183, and pp. 125, 126, *supra*.

[6] *Per* Garth, C. J., in Mamtazul Huq *v.* Nirbai, 12 C. L. R., 318, 321 ; I. L. R., 9 Calc., 718, 721.

[7] See Lindley's Thibaut, p. 175.

[8] Thus the words "suit by a *person excluded from joint family property* to enforce a right to share therein," in Art. 127, Act XV of 1877, have been held to be inapplicable to a suit *by* a *stranger* who has purchased a share in the joint property from a member of the family who was not in possession of his share at the time of the sale. Such a suit is governed by art. 136 or art. 144. Ram Lakhi *v.* Durgachurn, I. L. R., 11 Calc., 680 ; Horendro *v.* Aunoardi, I. L. R., 14 Calc., 544. See note (4), *infra*.

[9] *In re* Ramsunker, 3 C. L. R., 440 ; Robarts *v.* Harrison, 9 C. L. R., 209, 212 ; S. C., I. L. R., 7 Calc., 333 ; Umiashanker *v.* Chota Lal, I. L. R., 1 Bom., 19 ; Parell S. & W. Co. *v.* Manek, I. L. R., 10 Bom., 483, 487 ; Parashram *v.* Rakhama, I. L. R., 15 Bom., 299 ; and Syed Mahomed *v.* Kanhya Lal, 2 W. R., 263. In this last case it was laid down that the Court would not go beyond the words even if there was reason to infer that the case was within the *spirit* of the particular rule of limitation. Justice Mahmood is of opinion that when there is an ambiguity or indistinctness of meaning, the Indian Limitation Act should be construed in favor of its operation, and that exceptions

Letter *and* spirit. Spirit *only*, not sufficient (see p. 182, *supra*).

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Strictly and in favor of suitor. Art. 166, Act IX of 1871.

Thus the words "a decision *other* than a decree or order passed in a regular suit or *an appeal*" in art. 166, Sched. II of the Indian Limitation Act of 1871, which prescribed, for the execution of certain decisions, a *shorter* period of limitation than the ordinary period of three years, were construed to exclude an order in *any* appeal, whether regular or miscellaneous; and an order passed in a *miscellaneous* appeal was allowed to be executed within the longer period prescribed by the ordinary rule.[10]

Sec. 247, Act VIII of 1859.

Again, an order refusing to release from attachment property attached in execution, if passed *without investigation* of the claim of a third party under sec. 247, Act VIII of 1859 (corresponding to sec. 278, Act XIV of 1882) was not, it was held, governed by the one year's rule of limitation laid down for a similar order, passed, *after investigation*, under sec. 246 of that Act, corresponding to secs. 280, 281 and 282 of Act XIV of 1882.[1]

Art. 176, Act XV of 1877.

An application (by one of the *parties*) under sec. 516 or 525 of the Civil Procedure Code, that an award be filed in Court must, under art. 176 of Act XV of 1877, be made within six months; but it has been held that the *arbitrator* may himself hand the award to the proper officer to be filed, even after the six months, the act of the arbitrator not being an *application* within the meaning of the rule.[2]

Art. 171.

The word "plaintiff" in art. 171, Sched. II of the (unamended) Limitation Act of 1877, was construed as not including an "appellant," and an application by the legal representative of even a *plaintiff appellant* was held to be not governed by art. 171.[3]

Art. 112.

The words "suit for a call *by a company*" in art. 112 of Act XV of 1877, it has been held, cannot be interpreted

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to the general law of limitation should be construed strictly. Mangubai v. Kandhai Lall, I. L. R., 8 All., 475.

Beginning = 1st quarter.

The language of *pleadings* as to the time of dispossession, if ambiguous, is also construed in *favor* of the right to proceed. "Dispossessed in the *beginning* (*shoroocé*)" of 1139, may be construed to mean dispossessed in the *first quarter* of 1139. See Calcutta Sudder Dewany Adwalat Rep. for 1848, p. 97.

[10] Umiashanker Lakmiram v. Chota Vajiram, I. L. R., 1 Bom., 18. Under Act XV of 1877, there is no distinction, in this respect, between summary decisions and decrees in regular suits.

[1] Syed Mahomed v. Kanyha Lall, 2 W. R., 263.

[2] Robarts v. Harrison, 9 C. L. R., 209; (S. C.) I. L. R., 7 Calc., 331.

[3] In the matter of Ram Shunker Bhadoory, 3 C. L. R., 440. Act XII of 1879, sec. 108, extended art. 171 to appellants. The article did not apply to the legal representatives of *decree-holders*. (Gulabbai v. Lakshman, I. L. R., 3 Bom., 221; see also Ramananda v. Minambi, I. L. R., 3 Mad., 236). Art. 171 has been repealed by Act VII of 1888.

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to include a suit for a call *by a liquidator* on behalf of a company after its winding up—*Parell S. & W. Co.* v. *Manek*, I. L. R., 10 Bom., 483. Strictly, and in favor of suitor.

The words "suits to enforce the right to a share in any property on the ground that it is joint family property" in sec. 1, cl. 13 of Act XIV of 1859 (corresponding to art. 127, Sched. II of Act XV of 1877) have been construed to refer to suits by *some member or members against some other member or members of* the joint family, complaining of an ouster, or of a failure to account for profits, and not to a suit for redemption by such a member, where the question of the property being joint or not joint has to be decided *incidentally* as against *strangers, viz.*, the mortgagees of the whole family property, under a mortgage executed by the managing member.[4] Art. 127.

The word "payment" in cl. 13, sec. 1, Act XIV of 1859 has been construed (in favor of the right to proceed) to include *any* enjoyment of, or participation in, the joint property. Receiving money's worth is a "payment."[5] "Payment" in Act XIV.

The words "any party bound by any order respecting the possession of property under Act IV of 1840," in cl. 7, sec. 1 of the Limitation Law of 1859, were held not to include a person bound by a similar order under Chap. XXII, Act XXV of 1861, although the former Act had been repealed and re-enacted by the latter.[6] Section 3 of Act X of 1882 and sec. 3 of Act XIV of 1882 remove the difficulty suggested by these rulings, by *expressly* enacting that references in earlier Acts to the old codes shall be read as applying to the corresponding parts of the *new* codes. But even now, references to the *new* law cannot be treated as references to the *repealed* law. Accordingly an "order under secs. 280, 281, 282 or 335 of the Civil Procedure Sec. 1, cl. 7, Act XIV of 1859. Art. 11, Act XV of 1877.

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[4] Radhanath Dass *v.* Gisborne, 15 W. R., P. C., 24; (S. C.) 14 Moo. I. A., 1. In Issuridutt *v.* Ibrahim, I. L. R., 8 Calc., 653, a suit for *partition* by one *member* of the family *against* a *purchaser* of the joint property in execution of a decree against the managing member, was held to be governed by art. 127 of Act XV of 1877, which corresponds to sec. 1, cl. 13 of Act XIV of 1859. See note (8), *supra*.

[5] Kane Bable *v.* Antaji, I. L. R., 11 Bom., 455, 460; Achina *v.* Ajeejunnissa, 11 W. R., 45; Chundermonee *v.* Meherjan, 22 W. R., 185.

[6] Udhoob Narain *v.* Chutter Dharee, 9 W. R., 480. But it would have been otherwise if it had been provided that references to Act IV of 1840 should in future be treated as references to Chap. XXII of Act XXV of 1861. See Kangali Chunder *v.* Jomrudunessa, 8 C. L. R., 154; I. L. R., 6 Calc., 709, in which case, in construing art. 46 of Act IX of 1871, orders under Chap. XXII, Act XXV of 1861, were treated as including orders under Chap. XL of Act X of 1872, because the Legislature had expressly substituted the latter for the former.

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Code" in art. 11, Act XV of 1877, has been held not to include a similar order under the *repealed* Code of 1859.[7]

Sec. 29, Act VIII of 1869, B.C.

The words "the year in which the arrear claimed *shall have been due*" in sec. 32, Act X of 1859 (corresponding to sec. 29 of Act VIII of 1869, B.C., and art. 2 (*b*), Sched. III, Act VIII of 1885) have, upon a *fair* construction in favor of the right to proceed, been held to mean not only the year in which the arrear *first* became due, but also the year in which the obligation to pay the arrear was *revived*, by reason of a previous satisfaction of the claim being nullified by a decree between the parties.[8]

Statutory *exceptions* construed *liberally*, in favor of the suitor, when the words are not clear and precise.

Statutory *exceptions* to the rule of limitation have sometimes been construed rather *liberally* in favor of the right to sue. Thus the words "that the complainant had demanded the money, and that the defendant had admitted the truth of the demand," in sec. 14 of Beng. Reg. III of 1793, and cl. 14, sec. 18, Mad. Reg. II of 1802, were "on a liberal, but yet a fair and just, construction" held to be satisfied even where no precise sum was mentioned by either party, or where the admission was made to a third party, and such admission did not amount to a promise to pay.[9]

Sec. 14, Act XIV.

So again, the words "suit," "cause of action," and "defendant" in the *exception* enacted by sec. 14, Act XIV of 1859 (corresponding to sec. 14, Act XV of 1877) were inter-

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[7] Bissessur *v.* Murli, 11 C. L. R., 409; S. C., I. L. R., 9 Calc., 163; Rashbehary *v.* Buddun, 12 C. L. R., 550, 552; Gopal *v.* Mobesh, I. L. R., 9 Calc., 230.

Case where rent becomes *due* a *second* time.

[8] Ranee Surnomoyee *v.* Shoshi Mukhi Burmonea, 12 Moo. I. A., 244; 2 B. L. R., 10, P. C.; 11 W. R., P. C., 5. There was a period of time during which rent could not have been recovered, and the statute could not have run. Under the circumstances of the case a *new ground of claim* for rent had arisen when a previous satisfaction of the claim, by the sale of the defendant's putni, had been rendered nugatory by the sale being set aside. (Sheriff *v.* Dina Nath, I. L. R., 12 Calc., 258. See also Hurro Kumar *v.* Kali, I. L. R., 17 Calc., 251; Dhanput *v.* Saraswati, I. L. R., 19 Calc., 267). For a somewhat *analogous* case of a *new obligation to pay*, see notes under art. 64, Sched. II, in the Appendix, and Basu *v.* Dhumsing, I. L. R., 11 All., 47, P. C.

Where it does not.

In Rani Surnomoyee *v.* Shoshee Mookhee, the claimant of rent was until the setting aside of the sale that had taken place, in the position of a person whose claim had been satisfied. The right to sue in that case had been *suspended*. In Huro Pershad *v.* Gopal Das, I. L. R., 9 Calc., 255, their Lordships of the Privy Council held that where the right to sue for arrears of rent was *not suspended*, but where the plaintiff *chose* to sue the tenant for possession as a trespasser, and failed to recover possession, the pendency of such a suit did *not* prevent limitation from running against the plaintiff's claim for rent.

[9] Gopee Krishna Goshamee *v.* Brindabun Chunder Sircar, 12 W. R., P. C., 36; (S. C.) 13 Moo. I. A., 37; and Rajah Bommarauze *v.* Rungsamy, 6 Moo. I. A., 232.

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preted *liberally*, so as to embrace execution-proceedings against judgment-debtors, as such cases were clearly *intended* by the Legislature to be provided for.[10]

Exceptions construed *liberally* in favor of suitor.

The same section was applied to a case where the first suit and the second suit were based on *substantially* the *same* cause of action, and where, owing to the *erroneous form* in which the plaintiff brought the first suit, the Court had been unable to adjudicate upon the claim—*Shah Keramut Hossein* v. *Golab Koer*, 3 W. R., 101. This ruling, however, is commented upon by Mahmood, J., who is of opinion that the section should be construed *strictly*. (*Manghu* v. *Kandhai*, I. L. R., 8 All., 475).

Otherwise—when words clear and precise.

But where the language of the exception is precise and unambiguous (as in sec. 4, Act XIV of 1859, and Lord Tenterden's Act, sec. 1), it is safer to adhere to the words used.[1]

Sec. 5, Act XIV.

The words "any property *purchased bonâ fide* from a mortgagee" in the exceptionally *restrictive* provision of sec. 5 of the Limitation Act of 1859, (which greatly reduced the period of limitation to which a plaintiff, suing for redemption, was ordinarily entitled), were construed with strictness against the purchaser, and in favor of the mortgagor suing to recover the property. The purchase, it was held, must purport to be of the property as *absolute* property, and not merely of the existing rights of the vendor; and although the words "without notice" could not be found in the section, the expression *bonâ fide* was held to imply a want of notice of the infirmity of the title of the vendor.[2] The same rule of construction is applicable to the corresponding provision of Act XV of 1877, namely, to arts. 133 and 134 of the second schedule.[3]

Art. 134, Act IX.

The words "*conveyed* in trust" in the corresponding provisions of art. 134 of Act IX of 1871 were, however, interpreted *liberally*, so as to include *devises or bequests* in

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[10] Hurrochunder *v.* Soorodhoni, 9 W. R., 403, 406 (F. B.)

[1] Hyde *v.* Johnson, 2 Bing., N. C., 776; Beedoobhoosun *v.* Enaet, 8 W. R., 1; Luchman *v.* Rumzan, 8 W. R., 513. For a similar ruling on the latter part of sec. 1, cl. 15, Act XIV of 1859, see Luchmee Buxsh *v.* Runjeet Ram, 20 W. R., 375, P. C.

[2] Radhanath Das *v.* Gisborne, 15 W. R., P. C., 24; (S. C.), overruling the decision of the High Court in 5 W. R., 253. The expression *bonâ fide* has been since omitted in the corresponding provision of Act XV of 1877, *viz.*, art. 134, Sched. II. See the remarks of Green, J., in Maniklal *v.* Manchershi, I. L. R., 1 Bom., 269, 280, which go to show that *bonâ fides* is not *necessarily* inconsistent with notice of infirmity of title.

[3] Bhagwan *v.* Bhagwan, I. L. R., 9 All., 97.

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trust,[4] and this interpretation has been adopted by the Legislature in Act XV of 1877.

The rule as well as the exception applied with stringency when the words are clear and precise.

Where the language of the statute is precise and unequivocal, and there is no sufficient reason to doubt that the Legislature has deliberately used such language, the Courts give effect to the plain meaning of the words, and apply the law with stringency, even *against* the suitor.

Sec. 1, cl. 15, Act XIV of 1859.

Thus the words "to suits against a mortgagee of any immoveable property for the recovery of the same, a period of sixty years *from the time of the mortgage*; or, if in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given in writing *signed by the mortgagee*, or some person claiming under him, from the date of such acknowledgment in writing," in sec. 1, cl. 15, Act XIV of 1859, were held to bar a suit even against a *usufructuary* mortgagee (whose possession could not be adverse to the mortgagor until the debt was paid off), and although an acknowledgment signed by the authorized *agent* of the mortgagee had been given within the time required by the law. Here the plain words of the law embraced *every* kind of mortgage, and excluded any signature other than that of the *party* himself.[5]

The plain meaning of words departed from in very exceptional cases.

It is only in very exceptional cases that the literal construction of the law is avoided, and a reasonable construction put upon the words to meet the presumably real intention of the Legislature. When the strict letter of the law leads to palpable injustice, contradiction, and absurdity, out of respect to the Legislature, it is presumed that the words were used in a modified sense. (See p. 182, *supra*).

Sec. 20, Act XIV of 1859.

Thus, according to the literal sense of the words of sec. 20, Act XIV of 1859, no process of execution could ever issue to enforce a judgment, even within a week from the date of it, unless some proceeding had been taken to enforce it within three years next before the application for execution, and it was held that such a construction was *obviously insensible*, and that what the Legislature really intended

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[4] Maniklal *v.* Manchershi, I. L. R., 1 Bom., 269. The correctness of the *principle* of this construction is questionable. The general clause (art. 145, Act IX of 1871) might have been applied to the case with the same result, and a *liberal* interpretation of art. 134 was *not necessary* to meet the presumable intention of the Legislature.

[5] Luchmee Bux Roy *v.* Ranjeet Ram Roy, 20 W. R., 375, P. C. For a similar construction of sec. 4, Act XIV of 1859, see note (1), *supra*, and Lecture X. The signature of duly authorised agents is sufficient under the *express* provisions of Acts IX of 1871 and XV of 1877.

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was that no process of execution should be issued to enforce a judgment or order *after the expiration of three years from the date of it*, unless some proceeding to enforce it should have been taken within three years next before the application for such execution.[6]

Exceptional cases.

On a literal construction of sec. 21 of the same Act, a judgment-creditor could not, *after* the expiration of three years from the date of the passing of the Act, apply *de novo* to enforce a judgment, which was in force on that date, however diligent he might have been in endeavouring, within those three years, to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. As such a construction would cause great *inconvenience and injustice* and give the Act an operation which would *retrospectively deprive* the creditor of a *right* which he had under the old law, it was held that the words "*nothing* in the preceding section shall apply to a judgment in force at the time of the passing of the Act" really meant that that *part* of the preceding section which *prejudicially* affected such a judgment should not apply to it, and that it might be executed according to the *enabling* provision of that section.[7]

Sec. 21, Act XIV of 1859.

Again the words "no process of execution shall be issued on a judgment, after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding Rs. 500, &c.," in sec. 92, Act X of 1859, if literally construed, might deprive the applicant, *without any fault on his part*, of the fruits of his decree, even if he applied for execution on the very day after obtaining the judgment. But the decree-holder should not suffer any loss by reason of the *laches* of the Judge. *Actus curiæ neminem gravabit.* The words "shall be *issued*" were, therefore, construed to mean "shall be *applied for* with success," so that if the *application* for execution was made within the time, a *process* in the shape of an attachment

Sec. 92, Act X of 1859, and sec. 58, Act VIII of 1859, B.C.

"Act of Court hurts no person."

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[6] The Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C., which upholds the Full Bench ruling of the Calcutta High Court in Kangali Churn Ghosal *v.* Bonomali Mullick, 7 W. R., 515, and overrules the Bombay decisions in 3 Bom., 177, and 5 Bom., 102.

[7] See The Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C. Execution of an old decree, in force on the 4th May 1859, could, under sec. 21 of Act XIV of 1859, be applied for within the time allowed, although no proceeding to enforce it had been taken within three years before the application for such execution, and if a *bonâ fide* proceeding was taken within the time allowed by sec. 21, a *fresh* application for execution of the decree could, if necessary, be made under sec. 20, within another three years from the date when the last proceeding had been taken.

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Exceptional cases.

or otherwise might be issued even *after* the three years.[8] Where an application to be made a co-plaintiff in a pending suit was refused by the first Court, but granted by the Appellate Court *after* the period of limitation prescribed for the suit had expired, the delay between the date when the application was made in the First Court, and the decision of the Court of Appeal, being attributable to the *act of the Court*, it was held that the applicant should not suffer from such delay, and that the order granting the application should be treated as operating *nunc pro tunc*, and the applicant regarded as having been made a party to the suit when the application was made.[8a]

"Now for then."

Sec. 92, Act X of 1859.

The words "date of such judgment" in sec. 92, Act X, as re-enacted in sec. 58 of Act VIII of 1869, B.C., were, with some hesitation, interpreted, so far as a judgment for rent or money was concerned, to mean "the date when the rent or money is *adjudged to be payable*." A literal construction would make any decree by which the amount payable becomes due by instalments or otherwise, at a date more than three years subsequent to the judgment (although such judgment was obtained by consent) absolutely useless to the decree-holder, and would at the same time curtail the power of the Court to make a valid decree for a sum payable by instalments at a time *more* than three years from the making of it.[9] In a later case[10] it has been held that this ruling oversteps the limits allowed to Judges to modify the language of an Act; that the Legislature in sec. 58 of the Rent Act of 1869 has sufficiently expressed its intention that small decrees should not *in any event* be kept hanging over judgment-debtors for more than three years, and that although the section practically *curtails* the power of the Court as to making decrees ordering the payment of money by instalments, it does not *deprive* the Court of such power *altogether*.

Later F. B. Case.

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[8] Rhedoy Krisna Ghosh *v.* Koilash Chunder Bose, 13 W. R., F. B., 3. A similar interpretation has been put upon the corresponding words of sec. 58, Act VIII of 1869, B.C. See Deodhary *v.* Kunwar, 3 C. L. R., 189. Cf. Act VIII of 1885, Sched. III, art. 6.

[8a] Ramkrishna *v.* Rambai, I. L. R., 17 Bom., 29.

[9] Gureebullah Sircar *v.* Mohun Lall Shaha, I. L. R., 7 Calc., 127.

[10] See the judgment of the majority of the Judges in Mamtazul *v.* Nirbai, 12 C. L. R., 318, 328; I. L. R., 9 Calc., 711, F. B. In the case of an application for the execution of a decree under the Bengal Tenancy Act (not being a decree for a sum of money exceeding Rs. 500), art. 6, Sched. III, Act VIII of 1885 omits the provisions of cl. 6 and of some other clauses of art. 179, Act XV of 1877. In this respect the Legislature has adopted the ruling of the majority of the Judges in Mamtazul's case.

Beng. Tenancy Act.

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The words "unless the judgment be for a *sum* exceeding Rs. 500" in the same section, if literally construed, would exclude judgments in suits, for the possession of *land*, valued above Rs. 500. There is a dictum to the effect that the Legislature *may* have intended to include this class of judgments in the exception, for there is no reason why money-decrees of a certain value should have a longer period of limitation than decrees for land of the same value.[1]

"Sum exceeding Rs. 500."

The words "the date of the award" in section 327, Act VIII of 1859 (corresponding to art. 176, Act XV of 1877), have (to avoid inconvenience and injustice) been interpreted to mean the time when it is given to the parties, so that they may be able to give effect to it, and not to mean the day written in the award as when it was made.[2]

Art. 176, Act XV of 1877. "Date of award."

The words "*to all suits* for which no other limitation is hereby expressly provided, the period of six years from the time the cause of action arose" in sec. 1, cl. 16 of Act XIV of 1859, have been held to be no bar to suits for divorce *à vinculo*, which at the time of the passing of the Act were unknown in India, and which the provisions of Acts IX of 1871 and XV of 1877 (statutes *in pari materia*) expressly exclude from their operation.[3] Here the literal construction would have included cases *not contemplated* by the Legislature, and would have been inconsistent with its "intention as shown by *other indicia*."[4]

Sec. 1, cl. 16, Act XIV of 1859. "All suits."

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[1] See the judgment of Mitter, J., in 12 C. L. R., p. 325; I. L. R. 9 Calc., 711, F. B. But the Legislature has not adopted this opinion in art. 6, Sched. III, Act VIII of 1885.

Date of decree.

The words "fifteen days from the date of the decree" in section 52, Act VIII, B.C., of 1869, mean "fifteen days from the date of the appellate decree," if the original decree for ejectment has not been executed—Noor Ali *v.* Koni Meah, I. L. R., 13 Calc., 13. See p. 184, *supra*.

Rent decrees passed by Native Courts.

On a *grammatical* construction of sec. 58, Act VIII, B.C., of 1869, it was held that the section applied to decrees for rent, &c., passed by a Native Court, and transferred for execution to a British Court in Bengal—Hukum Chand *v.* Gayanandro, I. L. R., 14 Calc., 570. But art. 6, Sched. III of Act VIII of 1885 is *not* capable of such a construction. The Article applies *only* to decrees passed *under Acts* VIII of 1885, VIII, B.C., of 1869, or X of 1859.

[2] Sreenath *v.* Koylas, 21 W. R., 248; Dutto Singh *v.* Dosad, I. L. R., 9 Calc., 575. As to "decrees," see notes under sec. 12, Act XV.

[3] Lord William Hay *v.* Gordon, 18 W. R., 480, P. C.

New things or species.

[4] See Austin's Jurisprudence, Vol. II, p. 1024. But it should be observed that, except where the principle of *excessively strict construction* applies, the language of a statute *is generally extended* to new things or species which were not known and could not have been contemplated by the Legislature when the statute was enacted in general terms. (Maxwell, 2nd Ed., p. 93).

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Sec. 19, Act XIV of 1859. "Courts established by Royal Charter."

As the Sudder Courts in the three Presidencies of British India, in 1859, were not Courts established by Royal Charter, and as the Supreme Courts, which were then the only Courts established by Royal Charter, were subsequently replaced by the "Original Side" of the several High Courts, it has been held, that the words "Courts established by Royal Charter" in sec. 19 and other sections of Act XIV of 1859 were not intended to mean such Courts in the broad and general sense of the term, and that the High Courts, when exercising their appellate jurisdiction over the Mofussil Courts, like the quondam Sudder Courts, were *not* Courts established by Royal Charter within the meaning of Act XIV of 1859.[8]

Ordinary rules of interpretation.

Their Lordships of the Privy Council (in *Luchmee Bux Roy* v. *Runjeet Ram Pandey*, 20 W. R., 375) have laid down that, in construing the statutes of limitation, the ordinary rules of interpretation must prevail. The following[9] are some of the most important of these rules:—

The true intention to be ascertained by legitimate means.

(1). The object of all the rules of interpretation being to discover the *true intention* of the law, whenever that intention can be accurately and indubitably *ascertained*, the Courts are bound to give effect to it.[7] The intention of the Legislature must, however, be ascertained by *legitimate means*.[8] What has been previously said or done by the Law Commissioners or by the members of the Legislative Council may have been altered, or possibly, altogether abandoned before a contemplated measure has passed into a law.[9] Such statements or acts are therefore of little use in the interpretation of positive enactments.

What are or are *not* legitimate means.

Course of passage as a bill.

An enquiry into the vicissitudes which a particular measure has experienced, in the course of its passage as a *bill* through the Legislature, is also not a legitimate mode of ascertaining the intention of the Legislature.[10] In construing a statute the Court cannot look at a proposed bill

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[6] Kristo Kinkur Ghose v. Burrodakant Singh, 17 W. R., 292, P. C.

[7] A few other rules have already been referred to, see pp. 176—185.

[8] Kent's Commentaries, Lecture 20, 8th Ed., pp. 510, 519.

[9] Brown, p. 672. The intention of the Legislature must be collected from the *words* which the Legislature has *used*, and not from importing into the law any of the Judge's own notions of policy or any ideas of his own as to what may or may not have been the general policy or intention of the Legislature. (*Per* Sir B. Peacock, C. J., in Mahomed Akil v. Asadunnissa, 9 W. R., 1, at p. 58).

Intention *expressed* in the words.

[10] See Brown, p. 719. "The true question is what was enacted by Parliament, not what was said by individual legislators." Sir J. Stephen.

[11] Walji v. Jaganath, I. L. R., 2 Bom., 84, 88; Shaik Moosa v. Shaik Essa, I. L. R., 8 Bom., 241, 247. But see Hebbert v. Purchas, L. R., 3, P. C., 606, 648.

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to amend such statute.[1] The speeches in the Legislative Council, or the report of the Commissioners on which an Act may be based, should not be allowed to exercise any influence on the judicial mind.[2] The intention ought to be collected from what the Legislature has expressly stated in the law itself taken as a whole.[3] Conjectures as to the intention, if that is *unexpressed*, are inadmissible. Judges cannot fish out what possibly may have been the intention of the Legislature. If the Legislature intends that which it has not clearly expressed, if any other meaning is intended than that which the words purport plainly to import, another Act should supply that meaning, and supply the defect in the previous Act.[4] If the words of a law are clear and positive, they cannot be limited by what the Judges who apply it may conjecture to have been the

Speeches and reports of members, &c.

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[1] *In re* Rannak Hussain, I. L. R., 3 All., 283.

[2] 14 B. L. R., 150; Brown, 718. The opinion of the Legal Member of Council and the Statement of "Objects and Reasons" were not allowed to be read in Court by Garth, C. J., in Guju Lall *v.* Futteh Lall, 6 C. L. R., 439, 441; I. L. R., 6 Calc., 171, F. B. Cf. Chunilall *v.* Bomanji, I. L. R., 7 Bom., 310 and 315. In a *special* case, the Statement of Objects and Reasons of the Contract Act was referred to by Prinsep, J. (Mothoora Kant *v.* I. G. S. N. Co., I. L. R., 10 Calc., 192). In Queen-Empress *v.* Kartik Chunder, I. L. R., 14 Calc., 721, 728, a Full Bench of the Calcutta High Court referred to the proceedings of the Legislative Council, specially the reports of the Select Committee on the Bill which afterwards became the Indian Evidence Act. In Romesh *v.* Hiru (I. L. R., 17 Calc., 852, at p. 860), the notes to the Penal Code prepared by the Indian Law Commissioners, were allowed to be read even by Counsel. But Edge, C. J., and Straight, J., dissented from these cases, and held that in construing a statute the Court *cannot* refer to the statement of Objects and Reasons attached to a bill, or to the Report of a Select Committee or to the debates of the Legislature, but can only look to the statute itself. In Fadu Jhala *v.* Gour Mohun I. L. R., 19 Calc., 544, F. B., at p. 568, Pigot, J., referring to two cases in I. L. R., 8, and 15 Bom., says, that in Bombay reference to some of the proceedings of the Legislative Council has been allowed from a very long time to be made even by *Counsel*. The learned Judge also observed (at p. 569) that the right of a *Judge* to refer to some of the proceedings of the Legislative Council in order to arrive at the intention of the Legislature cannot since the F. B. case in I. L. R., 14 Calc., be questioned in Bengal.

Objects and reasons.

Reports of Committee.

Conflict. Allahabad.

Bombay and Calcutta.

[3] Brown, pp. 673, 718; 1 Hyde, 100; Mahomed Akil *v.* Asadunnissa, 9 W. R., 1, at p. 58. "The intention must be found in the Act itself" (Lalsingh *v.* Kunjan, I. L. R., 4 All., 387, 395). As remarked in Gopal Pandey *v.* Parsotam Dass (I. L. R., 5 All., at p. 135), "it is for the *Legislature* to consider and determine whether the words which they employ in framing the Acts will give effect to the object and policy which the State has in view. We are no doubt at liberty to consider the general state of the law which prevailed *in pari materia* prior to the enactment of any statute under consideration." Jehangir *v.* Perozbai, I. L. R., 11 Bom., 1, 4.

[4] Crawford *v.* Spooner, 4 Moo. I. A., 179. And cases cited at p. 380, I. L. R., 15 Calc.

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Expressed intention, and presumably real intention.

reasons for enacting it.[5] The *expressed* intention of the Legislature will of course control the construction of the words; and where the literal construction is obviously insensible, or leads to such inconvenience and injustice that the Legislature cannot reasonably be supposed to have intended it, an exception is allowed, and effect is given to the *presumably* real intention of the Legislature.[6]

A statute is to be taken and interpreted as a whole.

II. In interpreting an Act, the Court must not take one section only and see what its meaning is, but must look at the Act as a whole and see what was the intention.[7] One part of a statute must be so construed with the other parts that the *whole* may (if possible) stand.[8] Where two passages of an Act are so repugnant that they cannot *possibly* stand together, the *earlier* passage *gives way* to the later.[9] Otherwise, the one must be read as a qualification of the other, so that some effect may be given to each.[10]

Two articles of Act XV.

Where *two* articles or provisions of the Indian Limitation Act, Sched. II, may *possibly apply* to a particular suit, the *more specific* provision must prevail (*Ishur* v. *Jibun*, I. L. R., 16 Calc., 25, 29).

Statute to be read in its natural and ordinary sense;

III. The words of a statute, if they are of common use, are to be read in their natural and ordinary sense, that is in the sense in which they are understood by ordinary lay men. But technical terms must be taken according to the acceptation of the learned in each art, trade, and science.[1]

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[5] Moonshi Bazlore *v.* Shumsoonissa, 8 W. R., P. C., 3.

Analogies.

In dealing with *positive* enactments, reasons founded upon *analogies* are scarcely applicable—Ramchunder *v.* Jogeshchunder, 19 W. R., 353, P. C.

[6] Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, P. C.

Inconvenience.

The *argumentum ab inconvenienti* is only applicable in cases of *doubt*, and not where the law is clear. (Abdul *v.* Manji, I. L. R., 1 Bom., 295, 300). *Occasional* inconvenience is not a ground for rejecting the plain construction. Haji Abdul *v.* Khoja, I. L. R., 11 Bom., 6, at p. 18.

[7] Poorno *v.* Kristo, 23 W. R., 171. The construction is to be made of all the parts of a statute together, and not of one part only by itself. (*In re* Ratansi, I. L. R., 2 Bom., 148, at p. 165).

[8] Broom and Hadley's Commentaries, Vol. I, p. 95; Maxwell, p. 25; Essoo *v.* Sabitri, I. L. R., 11 Bom., 133, 37.

[9] Maxwell, p. 46. The same rule applies to wills and devises, but is inapplicable to *deeds* under English law. See Rule V, p. 197, *infra*.

[10] Shankar *v.* Vishnu, I. L. R., 1 Bom., 67, 69. See cases cited in I. L. R., 15 Calc., p. 380.

[1] Broom and Hadley, Vol. I, p. 95; Kent, Lecture 20, p. 511. Where in an Act, the Legislature uses a legal term which has already received judicial interpretation, it must be assumed that the term is used in

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IV. Statutes *in pari materia* (whether repealed or not) are considered as having one object in view, and are taken together as if one law, compared in their construction, and construed consistently.[2] But when the Acts are not *in pari materia*, the construction which has been put upon one cannot be relied upon as a guide to the construction of another.[3]

to be taken together with laws *in pari materia*.

V. Affirmative words in a statute do *sometimes* imply a negative of what is not affirmed as strongly as if it had been expressed.[4] Thus the words "*Every action* against &c. &c. should be brought within six months" in a later Act, have been held to involve the *negative*, and so impliedly to repeal the limitation provisions of an earlier Act.[4a] *Expressio unius est exclusio alterius.* The express mention of one thing implies the exclusion of another.[5] But a

The force of affirmative words.

"*Expressio unius.*"

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the sense in which it has been judicially interpreted. (Greaves *v.* Tofield, 14 Ch. D., 563; Jay *v.* Johnstone, 1 Q. B. [1893], p. 28).

The ordinary grammatical construction is, of course, liable to be modified by a consideration of the context and the purpose of the Act. Shidelingapa *v.* Karisbasapa, I. L. R., 11 Bom., 599, 602. The words "law in force immediately before the passing of the Code" in sec. 230, Act XIV of 1882, were construed to mean the *whole law* on the subject, and not merely art. 179 of Act XV of 1877. Such was their *plain grammatical* meaning, and there were no words to show a contrary intention. Motichand *v.* Krishnarav, I. L. R., 11 Bom., 524; Goluck *v.* Harapria, I. L. R., 12 Calc., 559. But see Musharrof *v.* Ghalib, I. L. R., 6 All., 189. This portion of sec. 230 has been repealed by Act VII of 1888.

"Law in force before."

[2] Brown, p. 679; Kent's Commentaries, p. 513; Wilberforce on Statutes, p. 260; Walji *v.* Jagannath, I. L. R., 2 Bom., 88; The Collector *v.* Punniar, I. L. R., 1 Mad., 89, 114. See notes to Rule VIII.

[3] Dyachand *v.* Hemchand, I. L. R., 4 Bom., 515, 526. The Court Fees Act is not *in pari materia* with the Limitation Acts. But Acts XIV of 1859 and IX of 1871, although repealed, are *in pari materia* with Act XV of 1877. "In dealing with one of several Acts relating to the same subject we ought, as far as possible, to apply to the sections of the later Act the same method of construction which has been applied to the corresponding sections of the earlier." Ulfatunnissa *v.* Hosain Khan, I. L. R., 9 Calc., 520, 525, F. B. But cf. Haji Abdul *v.* Khoja, I. L. R., 11 Bom., 6, at p. 18, and the notes to Rule VIII.

Construction of series of Acts on same subject.

[4] Bai Udekuvar *v.* Mulji, 3 Bom., 177. When a statute directs anything to be done in a particular way, that includes in itself a negative, *viz.*, that it shall not be done otherwise. (Morgan *v.* Leech, 2 Moo. I. A., 435; *In re* Mahadaji, I. L. R., 11 Bom., 375, 376). If the Legislature *creates* a *new* obligation to be enforced in a specific manner, as a general rule, performance cannot be enforced in any other way. (The Collector *v.* Romanath Tagore, 7 W. R., 191, F. B.) See note 5, *infra*.

Implied negative.

A *principal* command implies and includes the *incidental minor* commands *necessary* for giving it effect. (Shri Bhavani *v.* Devrao, I. L. R., 11 Bom., 485, 487). See note 1, p. 174, *supra*.

Incidental powers.

[4a] Maxwell, 2nd Ed., p. 190.

[5] Abdul *v.* Mauji, I. L. R., 1 Bom., p. 307. So it has been held that where by an Act of the Legislature, powers are given to any person

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special enactment is not impliedly repealed by a subsequent affirmative general enactment, if the two enactments are not so repugnant as to be incapable of standing together.[6]

When *negative* terms necessary.

Nor are affirmative words without any negative, expressed or implied, sufficient to take away an existing right.[7] When the later of two general enactments is couched in *negative* terms, it is difficult to avoid the inference that the earlier one is *impliedly* repealed by it.[7a] The words "*No suit* shall be maintained unless the same is instituted &c. &c.," in sec. 1, Act XIV of 1859, is an instance of an enactment couched in negative terms.[7b]

Construction of a term which occurs in several parts of the same Act.

VI. If it be reasonably possible, the same construction should be given to a word throughout the enactment, unless there be something in the context repugnant to that construction.[8]

Construction put by contemporary lawyers.

VII. In the construction of statutes, the sense which the contemporary members of the profession had put upon them is of some importance.[9] The Legislature is presumed to know the construction put upon statutes by the Courts.[10]

Special remedy.

for a public purpose from which an individual may receive injury, if the mode of redressing the injury is *pointed out* by the statute, the ordinary jurisdiction of the Civil Courts is ousted. (Ramchandra v. Secretary of State, I. L. R., 12 Mad., 105).

Exception to rule of *expressio unius.*

But this rule is not *universally* applicable. (See Prabhakar Bhat v. Vishwambhar, I. L. R., 8 Bom., 313, 318). An enactment which purports *expressly* to confer a narrow and limited right does not of *necessity* exclude a larger right, if the existence of the larger right is clearly established apart from the special enactment. But where the existence of a larger right is not clear, but highly doubtful, the express creation of the narrower right tends strongly to negative the existence of the larger. Kinu Ram Das v. Mozaffer Hossein, I. L. R., 14 Calc., 809, at p. 831, F. B.

[6] Unnoda v. Kristo, 19 W. R., 5, P. C.; Sabapathy v. Narainsamy, 1 Mad., 115.

[7] Collector v. Lukhamini, 21 W. R., 358, P. C.; Umachurn v. Ajoodanissa, I. L. R., 12 Calc., 430. See Shuttrughon v. Hokna, I. L. R., 16 Calc., 159, 160.

[7a] Maxwell, 2nd Ed., p. 189.

[7b] An enactment couched in *negative* words *prohibiting* any particular thing to be done, is always *imperative*, rendering *illegal* that which is done in contravention of such prohibition. (See Rule IX, *infra*).

Hearing and adjourned hearing.

[8] The Justices v. The G. I. P. R. Co., 9 Bom., 217, 219. The words "day fixed for hearing" in sec. 561, Civil Procedure Code, have, on this principle, been held by the Bombay High Court, to *include* the day to which the hearing is *adjourned*, as that is the sense in which those words are used in sec. 557 of the Code. Dinkar v. Vinayek, I. L. R., 11 Bom., 698.

[9] Kent, Lecture 20. The maxim *optimus legis interpres consuetudo* (custom is the best interpreter of the law) may well be applied in construing an old Act. (Bapu v. Baji, I. L. R., 14 Bom., 372, at p. 376).

[10] Wilberforce, p. 16; Eshan v. Prannath, 22 W. R., 513, 517; Probhakar v. Vishwambhar, I. L. R., 8 Bom., 313, 321.

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A long and uniform current of decisions should be upheld even if they are not strictly correct,[1] specially where they lay down a rule of property.[2] Where the course of decision is not long and consistent, or where it is manifestly wrong, the matter may be treated as *res integra*, that is, as a question which has not been concluded by authority.[3]

Current of decisions.

Res integra.

VIII. For the true interpretation of a statute, if the words are *not sufficiently explicit*, the old law, the mischief felt, the remedy in view, and the true reason of the remedy, should be considered.[4] The intention of the law is to be collected from these, as well as from the context of the Act to be interpreted, and of other Acts *in pari materia*. The construction made must repress the mischief and advance the remedy.[4]

How intention is ascertained when language is equivocal.

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[1] Sadasiva v. Ramalinga, 24 W. R., 193, P. C.; Unnada Prosad v. Kristocoomar, 19 W. R., 5, P. C. *Stare decisis*, to stand by matters decided, is a maxim of law. It has been said by Lord Mansfield that the *certainty* of a rule is of more importance than the *reason* of it. See also Muttuchidambara v. Karuppa, I. L. R., 7 Mad., 382.

Stare decisis.

[2] Appovier v. Ramashabha, 8 W. R., P. C., 1; Sudaburt v. Foolbash, 12 W. R., F. B., 1, 5. It would be in the highest degree dangerous to overrule plain and unequivocal statements of the law affecting rights of property or interests akin to rights of property made something like a century ago unassailed by any criticism or counter decision since—unless a very strong and conclusive case be established against the correctness of such statements of the law. (*Per* Lord Herschell, in Phillips v. Halliday [1891] A. C., 229, 233).

[3] Moharana v. Dessai, 21 W. R., 178, 180, P. C. See also Unnoda Persaud v. Kristo Coomar, 19 W. R., 5, P. C.

[4] Heydon's case; Kent, Lecture 20; Broom and Hadley, p. 95 and Wharton's Law Lexicon. The Court is bound to take notice of the changes of the law by statutes which alter the specific provisions of earlier enactments *in pari materia*. Ajudhia v. Balmukund, I. L. R., 8 All., 354, 359; Haji Abdul v. Khoja, I. L. R., 11 Bom., 6, 24. If a provision of the law be of doubtful import, resort may be had to the previous state of the law for the purpose of aiding in the construction of such provision. But the proper course, in the *first* instance, is to examine the language of the statute, and to ask what is its natural meaning, *uninfluenced by any considerations derived from the previous state of the law*. Except where a new Act is intended to be *merely* a *Code* of the *existing* law, it is *not* to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment. (Per Lord Herschell in Bank of England v. Vagiliano Brothers [1891], A. C., 144). Dr. Stokes is of opinion that this rule should be applied to the construction of the Indian Codes. But it should be observed that Act XV of 1877 *professes* to be an *amending* Act. (See the preamble).

Proper construction in the case of New Acts.

Indian Codes.

It has been held that Act XV of 1877 being one of a connected series of Limitation Acts, the presumption is strong against the intention to make a sudden and unexplained departure from the general line of policy running through the whole series. In such Acts mere changes of phrase not obviously involving changes of meaning ought not to be so treated as to alter the substance

Last of a series of Limitation Acts.

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Imperative and directory enactments.

IX. A positive *mandatory* enactment is not necessarily *imperative*—*i.e.*, obligatory with an implied *nullification* for disobedience. It *may* be *directory* only.[5] On the other hand, although the exercise of a *power* is naturally *permissive*, there *may* be circumstances which may couple the power with a *duty* to exercise it.[6]

"Shall be done" and "shall not be done."

With reference to the first portion of Rule IX, Sir John Edge, C. J., points out that there is a difference between a case in which a Court, or an officer of a Court, *omits* to do something which by a statute it is enacted *shall be done*, and cases in which a Court, or an officer of a Court, *does* something which by a statute it is enacted *shall not be done*. In the one case the omission to do an act which by the statute it is enacted shall be done, *may* not amount to more than an *irregularity* in procedure, whilst in the other case, in which the *prohibition* is enacted, the *doing* of the *prohibited thing* by the Court or the official is *ultra vires* and *illegal*; and if *ultra vires* or illegal, it must follow that it was done *without jurisdiction*.[6a]

Change of language.

of the law. (Per Wilson, J., in Girwar Singh *v.* Thakur Narain Singh, I. L. R., 14 Calc., 730, at p. 733). The presumption that a change of language indicates a change of intention ought not to have too great weight assigned to it. (Maxwell on Statutes, p. 368, cited at p. 24, I. L. R., 11 Bom.) Nevertheless, it is the duty of the Court to find out what the Act under consideration means, and not, to embarrass itself with previous decisions on former Acts when considering the construction of a *plain* statute framed in *different* words from the former. (*Per* Sir G. Jessel, M. R., in Hack *v.* London P. B. Society, L. R., 23 Ch. Div., at p. 108, cited at p. 18, I. L. R., 11 Bom.) Compare the remarks of Lord Herschell in A. C. [1891], p. 144, and the opinion of Dr. Stokes referred to above.

[5] See Howard *v.* Bodington, 1877, 2 Probate Div., 210, at p. 216. See also Burjore *v.* Bhagana, I. L. R., 10 Calc., 557, P. C. A breach of the direction (in a *directory* statute) works *no invalidity* of the thing *done*. Kent, Lecture 20. See note (2), p. 184, *supra*.

Enactments regulating the procedure in Courts seem *usually* to be imperative, and not merely directory. (Maxwell, 2nd Ed., 456; Damodar *v.* Gokal, I. L. R., 7 All., 79, at p. 87).

[6] If a public officer is empowered to do an Act for the benefit of persons who are *specifically* pointed out, and the conditions upon which they can call for its exercise are given, the power *must* be exercised. Julius *v.* Lord Bishop of Oxford, 5 Appeal Cases, 214. See note, p. 178, *supra*.

Affirmative commands, and negative prohibitions.

[6a] Rameshur *v.* Sheodin, I. L. R., 12 All., 510, at p. 517, F. B. In the same case Mahmud, J., observes that the recognised rules of interpreting statutes draw a distinction between *affirmative* terms however mandatory, whether such mandate is conveyed by the word "may" or by the word "shall," and *negative* terms *prohibiting* the doing of any particular thing; and that whilst in cases of *affirmative* words even the word "shall" *might* be taken to be only *directory*, in cases of *negative* words, prohibiting the doing of a particular thing, the enactment is *imperative*, and as such, it renders *illegal* that which is

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What statutes do not embrace the Sovereign.

X. Statutes limiting rights and interests are not to be construed to embrace the Sovereign or the Government, unless the same be expressly named or intended by necessary implication.[7] It is a universal rule that prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a statute. This rule of interpretation according to which the Crown is not affected by a statute unless specially named in it, is well established, and applies not only to the statutes passed by the British, but, according to Mr. Justice West, also to the Acts of the Indian Legislature framed, as they are, with constant reference to the rules recognised in England.[8]

Exception and separate proviso.

XI. If there be an exception in the enacting clause of a statute, it must be negatived in pleading; but if there be a *separate* proviso, that need not.[9] So far as laws of limitation are concerned, this technical distinction is perhaps of little use in British India. The Civil Procedure

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done in contravention of such prohibition. (*Ibid.*, p. 521). This rule so far as it renders a *contract* illegal, has an exception. See Maxwell, 2nd Ed., pp. 483, 490.

[7] Kent, Lecture 20, p. 507. In England, the Crown is not bound by statutes of limitation, unless named.—Wilberforce, p. 38. But in the Bombay and Madras Presidencies, before Act IX of 1871 came into force, suits by the Collector representing the East India Company, or the Secretary of State for India in Council, were apparently governed by the *ordinary* rule of limitation. In Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175, the question of the applicability of Madras Reg. II of 1802, to the East India Company and the Secretary of State, was raised but not decided. It may be fairly *contended* that, although the East India Company enjoyed delegated Sovereign rights, it did not claim them in matters of litigation, and the Crown, on resuming the rights it had delegated, voluntarily placed itself in such matters in the position of the Company. See p. 185. *Ibid.* See also Appaya *v.* Collector, I. L. R., 4 Mad., 155, and notes to art. 149, in the Appendix.

Limitation against the East India Company, in Bombay and Madras.

[8] Ganpat *v.* The Collector, I. L. R., 1 Bom., 7, 9. Sargent, C. J., in 1889, adopts this opinion of West, J. (See Secretary of State *v.* Mathura, I. L. R., 14 Bom., 213). But, it would appear to have been assumed, in Acts IX of 1871 and XV of 1877, that easements might be acquired against Government, by *statutory prescription*, in the same way as they are acquired against private individuals. See Arzan *v.* Rakhal, I. L. R., 10 Calc., 214, 219. In Act V of 1882 it has been deemed necessary to make an *express special* provision in favor of Government. (See sec. 15, Expl. 4, paragraph 2). Compare 5 Mad., 6. It may be here remarked that even in England the Courts may *independently of the statute, presume a grant* from the Crown upon an uninterrupted enjoyment of twenty years. (Goodtitle *v.* Baldwin, 11 East, 488, cited in Banning on Limitation, p. 252). As to *presumptions* against the Crown, arising from the acts of other persons, see also Brown, 244.

Statutory prescription against Government.

[9] Kent, Lecture 20. A *saving* clause in a statute is rejected if repugnant and inconsistent with the body of the statute. But a *proviso*, according to some books, should stand even if the body or

Saving clause and *proviso*.

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Code requires the plaintiff in *all* cases to state when his cause of action accrued, and, if the cause of action accrued beyond the period ordinarily allowed by any law of limitation, the ground upon which exemption from the law is claimed.[10]

Repealing a Repealing Act.

XII. If a statute be repealed, and afterwards the repealing Act be repealed, this revives the original Act.[1] This common law rule has been abolished in British India.[2] For the purpose of reviving, either wholly or partially, a repealed Statute, Act or Regulation, it is necessary *expressly* to state such purpose.

Time when a statute comes into force.

XIII. The date from which an Act or statute speaks is the date at which it comes into *operation*.[3] A statute comes into operation from the very day it passes, if the law itself does not establish the time.[4]

Statutes are not presumed to be retrospective.

XIV. Although the Legislature possesses the power to divest existing rights, it is not to be understood as intending to exercise that power *retrospectively* to any greater extent than the express terms of, or necessary implication from, its language requires.[5] The presumption against the retroactive operation of a statute may (where no vested right would be taken away) be rebutted by the fact that a future time is fixed for its coming into operation.[6] See p. 209, *infra*.

As to things already done.

When a statute is *unconditionally* repealed, it must be considered (except as to "anything done," i.e., except as to transactions past and closed) as if it had never existed. A title acquired, under an enactment of positive prescription before it is repealed, is a transaction past

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purview of the statute is repugnant to it. Such a proviso is held to be a repeal of the purview. *Ibid.* Rules II and XX are founded on a similar principle.

[10] Act VIII of 1859, sec. 26; Acts X of 1877 and XIV of 1882, sec. 50. The *plaintiff* must show the grounds, &c., the cause of action, and when that cause of action accrued. Mylapore v. Yeokay, I. L. R., 14 Calc., 801, 805, P. C.

[1] Kent, Lecture 20.

[2] See Act I of 1868, sec. 3; and Bengal Regulation XLI of 1793. The rule has also been abolished in England.

[3] Tupsee v. Ramsarun, I. L. R., 15 Calc., 376, at p. 382.

Act, when *passed*.

[4] Kent, Lecture 20, pp. 501, 505. An Act made by the Viceregal or a Local Legislative Council is *passed* when it receives the assent of the Governor-General. See secs. 20, 40 and 48 of 24 and 25 Vict., c. 67.

[5] Icharam v. Govindram, I. L. R., 5 Bom., 653.

[6] *In re* Ratansi Kalianji, I. L. R., 2 Bom., 148, 171; Towler v. Chatterton, 6 Bing., 258.

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and closed within the meaning of this rule, and cannot *primâ facie* be retrospectively affected by a new law.[7]

They do not *primâ facie* affect past transactions or pending proceedings.

XV. In the absence of an express provision, the total or partial[7a] repeal of any Statute, Act or Regulation by any Act of the Governor-General of India in Council does not affect *anything done* or any offence committed, or any fine or penalty incurred, or *any proceedings commenced* before the repealing Act comes into operation.[8] Except when some provision is made to the contrary, all proceedings in a suit *instituted* or an application *made before* the repeal, including the appeal and special appeal, are governed by the old law.[9] An application for the execution of a decree obtained in such a suit, if *commenced before* the repeal,

Sec. 6, Act I of 1868.

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[7] Sitaram *v.* Khanderao, I. L. R., 1 Bom., 286, 294; *In re* Ratansi, I. L. R., 2 Bom., 148, 162. An auction-purchaser of an estate at a revenue sale under Bengal Reg. XI of 1822 could not, *after the repeal* of the Regulation, exercise the statutory power of annulling an under-tenure within the estate. Khajah Assanoollah *v.* Obhoy Chunder Roy, 13 W. R., P. C., 24.

[7a] See sec. 9, Act I of 1887.

[8] Act I of 1868, sec. 6, as amended by Act I of 1887; and Syud Nadir Hossein *v.* Bissen Chand, 3 C. L. R., 437, 438.

[9] Runjit Sing *v.* Meharban, 2 C. L. R., 391, 392, 396, F. B.; S. C., I. L. R., 3 Calc., 662; Ruttan Chand *v.* Hanmantrao, 6 Bom., 168; Thakur Persad *v.* Ashan Ali, I. L. R., 1 All., 668, F. B.; Satghury *v.* Majidan, I. L. R., 15 Calc., 107.

Expressly retrospective.

For an "*express* provision made to the contrary," see sec. 21, sub-section 2, Act VIII of 1885. The sub-section affects the rights of parties in suits *pending* when the Act came into operation. Jogessur *v.* Aisani, I. L. R., 14 Calc., 553; Tupsee *v.* Ramsarun, I. L. R., 15 Calc., 376, F. B.

Proceeding,—what it means and includes.

The word "proceedings" is a very general one, it is *not* limited to *civil* proceedings, but includes proceedings in *Revenue* and *Criminal* Courts. *Certain judicial* proceedings in the *Civil* Courts are called "suits" as opposed to "miscellaneous proceedings." Proceedings for certificates of guardianship or for the collection of debts due to the estate of deceased persons, proceedings in execution of a decree in a suit &c., &c., are in the language of our Courts, *miscellaneous* proceedings. Even non-judicial proceedings, *e.g.*, the ministerial proceedings leading to foreclosure under Bengal Reg. XVII of 1806, are "proceedings" within the meaning of sec. 6 of the General Clauses Act. (Umesh Chunder *v.* Chun Chun, I. L. R., 15 Calc., 357). The word "proceedings" as applied to a "suit," may mean the suit as an entirety—that is to say, down to the final decree (Satghuri *v.* Majidan, I. L. R., 15 Calc., 107) or it may mean the *separate steps* taken in the course of a suit the aggregate of which makes up the suit. (Debnarain *v.* Narendra Krishna, I. L. R., 16 Calc., 267, 273, F. B.) The first and the second appeal in a suit are but steps in a series of proceedings connected by an intrinsic unity. (Chinto *v.* Krishnaji, I. L. R., 3 Bom., 214). An appeal is a *part* of the proceedings in a suit. (Rattan Chand *v.* Hanmantrao, 6 Bom., 166; Hurrosundari *v.* Bhojohari, I. L. R., 13 Calc., 86; Debnarain *v.* Narendra Krishna, I. L. R., 16 Calc., 267, 278). Although an application for the execution

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Operation of sec. 6, Act I of 1868.

would be a *pending* proceeding and be governed by the old, and not by the new, law.[10] According to Wilson, J., the operation of sec. 6, Act I of 1868, *ought* to be limited to the cases in which a *change* in the law is *strictly* the result of the *repeal* of an enactment, not of *substantive enactment* in the new legislation. (I. L. R., 16 Calc., 267, at pp. 279, 280). The section has no application where a new enactment provides its own rule of construction (*ibid.*, p. 272).

What are *pending proceedings* within the meaning of sec. 6.

of a decree is an application *in the suit* in which the decree was obtained (Mungul Persad *v.* Girja Kant, I. L. R., 8 Calc., 51, P. C.), it has been held by the Bombay High Court that where a decree has been obtained the application for execution *initiates a new set of proceedings*, and that the rule of the General Clauses Act (sec. 6, Act I of 1868) does not govern all the remotest ministerial consequences of a final decree in a suit, arising on applications made years afterwards, but only such series of proceedings as group themselves naturally together, as, *e.g.*, those on a *particular* application for execution (Gurupadapa *v.* Virbhadrapa, I. L. R., 7 Bom., 459). A Division Bench of the Calcutta High Court also, held that a proceeding to be a *pending* proceeding *after* the decree must be initiated by an application for execution (Jugmohun *v.* Luchmessur, I. L. R., 10 Calc., 748). But in Hurrosundari *v.* Bhojohari, I. L. R., 13 Calc., 86, another Division Bench of the Calcutta High Court expressed an *opinion* that applications for the execution of a decree in a suit were parts of the proceedings in the suit, and as such were governed by the law which prevailed at the time of the institution of the suit. It has now been settled by a Full Bench of the Calcutta High Court that the term "proceedings" in sec. 6 of Act I of 1868 does *not* include proceedings in *execution* after decree, that though execution is a *step* in the suit, it has, for the purposes of sec. 6, been regarded as a proceeding *separate* from the *other steps* in the suit, and that (unlike an appeal) proceedings arising in execution are not necessarily between the *parties* to the suit. (Debnarain *v.* Narendra Krishna, I. L. R., 16 Calc., 267, at p. 279).

1st and 2nd applications for execution.

[10] *In re* Ratansi, I. L. R., 2 Bom., 148; Thakur Prosad *v.* Ashan Ali, I. L. R., 1 All., 668; Govind *v.* Narryen, 11 Bom., 111; Pasupati *v.* Pasupati, I. L. R., 1 Mad., 52. Where the first application for execution is made *before* the repealing Act comes into force, and a subsequent application for execution is made *after* the repeal, such *latter* application is (in the absence of exceptional provisions) governed by the new law. [Gurupadapa *v.* Virbhadrapa, I. L. R., 7 Bom., 459; Jugmohun *v.* Luchmessur, I. L. R., 10 Calc., 748; Becharam *v.* Abdul Wahed, I. L. R., 11 Calc., 55. See also the latter part of note (9), *supra*. For an *exceptional provision*, see sec. 1, cl. (a), Act IV of 1871, and Mungul Pershad *v.* Girja Kant, I. L. R., 8 Calc., 51, P. C.

Setting aside sale in execution.

An application to set aside a sale in execution of a decree is a part of the execution proceeding, and is governed by the old law, if the *application for execution* was made *before* the repeal and was still pending. Chinto *v.* Krishnaji, I. L. R., 3 Bom., 214. See also Lalmohun *v.* Grish Chunder, I. L. R., 14 Calc., 636, F. B. Cf. I. L. R., 11 All., 408.

Substantive *rights*, and rules of *procedure*.

If the new law confers a *substantive right* on judgment-debtors, and does not lay down a mere rule of *procedure*, it cannot (ordinarily) have any retrospective operation, and a right acquired by the decree-holder under a decree obtained under the old law is not affected by the new law, although an application for the execution of the decree is made *after* the new law comes into operation. (See Uzir Ali *v.* Ram Komal, I. L. R., 15 Calc., 383, F. B.) Sec. 6, Act I of 1868

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The effect of sec. 6, Act I of 1868, is to save even rights of *procedure*, in proceedings commenced *before* the repeal of the old law. As a general rule, no suitor has any vested interest in the course of *procedure*. But sec. 6, Act I of 1868, *limits* the application even of this general rule. (*Ganga* v. *Kishen*, I. L. R., 6 All., 262, at pp. 264, 268).

Procedure in *pending* proceedings governed by old law.

XVI. In all Acts made by the Governor-General of India in Council since January 1868,[1] unless there be something repugnant in the subject or context—

The General Clauses Act, 1868.

(*a*) words importing the masculine gender include females;

(*b*) words in the singular include the plural, and *vice versa*;

(*c*) "person" includes any company or association or body of individuals, whether incorporated or not;

(*d*) "year" and "month" respectively mean a year and month reckoned according to the British calendar;

(*e*) "immoveable property" includes land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;[2]

Rights of parties in *fresh* proceedings.

says that *pending* proceedings shall not ordinarily be affected by the new law. It does *not* say that the *rights* of parties to a proceeding commenced *after* the repeal of the old law *shall be* retrospectively affected by the new law. In a proceeding *pending* at the time of the commencement of the new Act, the old law ordinarily applies in respect of the *rights* of parties, as well as in respect of the rules of *procedure*. But the *rights* of parties to a proceeding commenced *after* the repeal of the old law are not necessarily governed by the new law. A substantive *right* acquired under the old law cannot, ordinarily, be retrospectively affected by the new law.

Procedure in *fresh* proceedings.

As no person has any vested right in procedure, the new Procedure or Limitation law applies to a new application for substitution of names on the record, although such application is an application in a suit or appeal *instituted before* the new Procedure or Limitation law came into force. (See art. 175C, and Chajmal *v.* Jagadamba, I. L. R., 11 All., 408). Cf. paragraph 2, note 10, *supra*.

[1] See Act I of 1868, the General Clauses Act, sec. 2. Another General Clauses Act, I of 1887, defines certain other words occurring in *later* Acts.

Immoveable property includes incorporeal hereditaments.

[2] The term "immoveable property" in Act XIV of 1859 included incorporeal hereditaments. The word "immoveable" was used as something less technical than "real," and the term "immoveable property" comprehended certainly all that would be real property according to English law, and possibly more. (Maharana Futtehsangji v. Dessai Kullianraiji, 21 W. R., 178, at p. 181, P. C.) The expression "real property" in English law includes hereditaments, corporeal and incorporeal. And incorporeal hereditaments are the rights and profits annexed to or issuing out of land, and include commons, ways, watercourses, lights, &c. (Stephen's Commentaries, 11th Ed., Vol. I, pp. 170-173, 619). The remarks of their Lordships of the Privy Council in

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(*f*) "moveable property" means property of every description except immoveable property;

(*g*) "British India" means the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vict., c. 106, other than the Settlement of Prince of Wales' Island, Singapore, and Malacca;

(*h*) "High Court" means the highest Civil Court of Appeal in the part of British India in which the Act containing such expression shall operate.

The word "include" in the General Clauses Act is enumerative, not exhaustive. (*Empress* v. *Ramanjiyya*, I. L. R., 2 Mad., 5. See also *Rodger* v. *Harrison*, 1 Q. B. [1893], pp. 167, 171; and p. 179, *supra*).

The word "from."

XVII. In all such Acts made after the 3rd of January 1868, the use of the word "from" is sufficient for the purpose of excluding the first in a series of days or any other period of time.[*a] (Sec. 3, Act I of 1868).

Length of period, how computed.

In considering what is the length of a calendar month or year, it is sufficient to go from one day in one month or

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21 W. R., p. 181, were evidently not brought to the notice of the learned Judge, who at p. 564 of I. L. R., 19 Calc., 544, observes that "the words *immoveable property* in Act XIV of 1859 were never held to include easements and rights in the lands of others." In Fadu Jhala v. Gour Mohun (I. L. R., 19 Calc., 544, at p. 553, F. B.) Mr. Justice Pigot

Profits *à prendre*.

remarks that the term "immoveable property" in the General Clauses Act I of 1868 include "benefits to arise out of land," and therefore includes a profit *à prendre*, such as a fishery. But the learned Judge is of opinion that the term does not include a mere convenience or easement not amounting to a profit. See, however, Lecture XII, *infra*.

Growing trees.

The term includes "growing trees"—see Jagrani v. Gonesh, I. L. R., 3 All., 435. A right to officiate as priest at the funeral ceremonies of Hindus in a particular mouza is not "immoveable property" within the

"*Nibandha*."

meaning of this definition. But see Roghu v. Kasi, 13 C. L. R., 363, and p. 177 (note), *supra*. A right to a fixed permanent allowance or payment (*nibandha*) is regarded by Hindu law as immoveable estate. But the receipt of such payments cannot be regarded as possession of immoveable property, so as to enable the right to be acquired by prescription under the law of British India. Lakshmandas v. Manohar, I. L. R., 10 Bom., 149. A continued series of voluntary payments

Voluntary payments, and *prescription*.

by A to B (B not having any acknowledged right to receive the same) cannot confer a prescriptive right on B. (Collector of Surat v. Dajiba, 8 Bom., 166). In Shri Kalyanraiji v. The Mofussil Company, I. L. R., 14 Bom., 526, 529, their Lordships of the Privy Council assume that a claim by the managing proprietor of a temple in a town to a perquisite or tax on all cotton bought in the town for export therefrom may be presumed to have had a legal origin, if such perquisite has been received *as of right* from time immemorial.

From, and *after*.

[*a] The word "from" in *documents* also excludes the first of a series of days. Per Day, J., in 1 Q. B. [1891], 402. The words "within one calendar month *after* the cause of action or complaint" in a statute exclude the day on which the cause of action or complaint arises. Radcliffe v. Bartholomew, 1 Q. B. [1892], 161.

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year, to the corresponding day in the next, and to exclude from the computation the day "from" which the month or the year is calculated, so that two days of the same number are not comprised in it.[3]

When a statute requires that something shall be done "forthwith" or "immediately," or even "instantly," it would probably be understood as allowing a *reasonable time* for doing it.[3a] (*In re Sheshamma*, I. L. R., 12 Bom., 276). "Forthwith." "Immediately."

The General Clauses Act of 1887 extends the principle of cl. 1, sec. 5, Act XV of 1877 to acts or proceedings done or taken under any later Act, and to which Act XV of 1877 itself is inapplicable. (See notes to sec. 5, in the Appendix).

XVIII. The interpretation of the following words in the Indian Limitation Act of 1877 is governed by sec. 3 of the Act:— The interpretation clause of Act XV.

Plaintiff, applicant, defendant, easement, bill of exchange, bond, promissory note, trustee, suit, registered, foreign country, and good faith. See sec. 3, in the *Appendix*.

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[3] See Maxwell on Statutes, p. 310; Kashi Kant *v.* Rohini Kant, 7 C. L. R., 342, 343; I. L. R., 6 Calc., 325; Banning on Limitation, p. 256; and Act I of 1868, sec. 3. A debt becomes due at the last moment of the period of time which is allowed to the debtor for payment; limitation commences to run "from" the last day of such period, and the day corresponding to that from which the computation of the limitation period (one year or a number of years) begins is the last day for bringing the suit. If the due date is the 11th April, the period of limitation commences to run from the 11th April, and ends on the 11th of April of some following year. The period from the 12th April to 11th April of the next year (inclusive of both days) is one year. See Deb *v.* Ishan, 13 C. L. R., 153. Computation of years and months.

As there is no such date as the 30th of February, or the 31st of April, June, September or November, the computation, according to the rule in the text, must often end with the last day of these months. Thus bills at one month drawn on the 28th, 29th, 30th or 31st January all fall due on the 28th February. In leap years such bills drawn on the 29th, 30th or 31st January fall due on the 29th February. See Migotti *v.* Colvill, 4 L. R., C. P., 233. An imprisonment for a calendar month commencing on the 5th of January would end at 12 o'clock on the night of the 4th of February. *Ibid.* Six calendar months from the 31st January will expire on the 31st July. Six calendar months from the 28th February will expire on the 28th August. Three calendar months from the 31st of January expire on the 30th April. Markby, sec. 290. See Lecture VIII, and notes under sec. 25, Act XV, in the Appendix.

When so many "clear days," or so many days "at least" are given to do an act, or "not less than" so many days are to intervene, *both* the terminal days are excluded from the computation. In other cases, it would seem, the rule is to exclude the first and include the last day. (Maxwell, 2nd Ed., p. 422). "So many *clear days.*"

[3a] Maxwell, 2nd Ed., p. 423. An application to deprive a plaintiff of costs which must be made "at the trial," was deemed made in time, when made an hour after the trial was over, and the Judge was trying another cause. *Ibid.*

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Construction of a general statute must be general.

XIX. A *general* construction must be put upon the terms and clauses of a general statute; their applicability must be determined by the nature of the thing sued for, and not by the status, race, character or religion of the parties to the suit.

In the case of a general law of limitation, the period of limitation within which a claim is barred must be fixed and uniform, by *whomsoever* the claim is preferred or resisted. The only exception to this rule, if exception it can be called, is where the thing sued for is *incapable* of being held by a person not belonging to a particular race or creed.[4]

Customs do not override the law of limitation.

XX. Customary law must give way to the express command of the Legislature. It cannot override the positive prescriptions of the Limitation Act.[5]

Rules XIV and XV relating to the difficult question of the retroactivity of statutes require some further notice.

Retrospective operation of laws.

It cannot be denied that the Legislature has full authority to pass retrospective laws even to the divestment of vested rights; but when it intends to do so, it does so either by expression, or unmistakable indication on the face of the law itself.[6] In the absence of any such guides to the ascertainment of the intention, the *presumption* is that a statute depriving the subject of a *vested right* is not retrospective.[6a] But such a presumption does not exist where a statute is remedial and merely affects the *procedure* in Courts of Justice[7] (such as one relating to the service of

As affecting vested rights or mere procedure.

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[4] Moharana Futtehsangji *v.* Desai Kullianraiji, 21 W. R., 179, 181, P. C. Certain hereditary offices are incapable of being held by persons other than Hindus.

[5] Mohanlal *v.* Amratlal, I. L. R., 3 Bom., 174, 177.

[6] "The provision of an Act which creates a new right cannot, in the absence of express legislation or direct implication, have a retrospective effect." Lalmohun *v.* Bonomally, I. L. R., 14 Calc., 636, F. B. Sub-section 2, sec. 21, Act VIII of 1885, is an instance of the retrospective operation of laws, affecting the rights of parties to a proceeding commenced before the Act came into operation. See Jogessur *v.* Aisani, I. L. R., 14 Calc., 553; Tupsee *v.* Ramsarun, I. L. R., 15 Calc., 376, F. B.

Affecting vested rights, or character of *past* transactions.

[6a] Every statute which takes away or impairs vested rights acquired under existing laws, or prejudicially affects the legal character of past transactions by creating a new obligation, attaching a new disability, or imposing a new duty, must be *presumed* to be intended not to have a retrospective operation. (Maxwell, 2nd Ed., pp. 257, 258). But a statute is not retrospective in the sense under consideration, because a *part* of the requisites for its action is drawn from a time *antecedent* to its passing. It would *not* be giving a retrospective operation to an Act to apply it to a state of circumstances not *past and complete*, but *continuing* after it was passed. (*Ibid.*, 264).

[7] In matters of substantive right, statutes are not to be so read as to take away vested right; but in matters of procedure they are general in their operation. (Per Wilson, J., in Bhobosundari *v.*

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proceedings, or what evidence must be produced to prove particular facts); and where its language in terms applies to all actions, whether before or after the Act, the new procedure may (unless prohibited by Rule XV) be retrospectively applied; but where the change in procedure is complicated by the divestment of pre-existing right, the presumption against its retroactivity revives in its full strength.[s]

Procedure affecting vested rights.

Rakhal Chunder, I. L. R., 12 Calc., 583, F. B.) The settled rule of construction ordinarily acted upon (in the absence of any statutory rule inconsistent with it) is, that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings. (Deb Narain *v.* Narendra Krishna, I. L. R., 16 Calc., 267, at p. 272, F. B.) "No one has a vested right in any particular form of procedure." Warner *v.* Murdoch, L. R., 4 Ch. D., 752. (A right of action is a vested *right*, but a right of appeal is mere *procedure*. Framji *v.* Harmasji, 3 Bom., 49). This principle may be adopted and acted upon in the Courts here *except* in so far as sec. 6 of the General Clauses Act, 1868, limits its application by saving "proceedings" *commenced* before a repealing Act has come into effect. (Ganga Sahai *v.* Kishen Sahai, I. L. R., 6 All., 262, 268; Chajinal *v.* Jagadamba, I. L. R., 11 All., 408, 412).

Right of appeal—mere procedure.

Remedial statutes may be of a retrospective nature, provided they do not impair contracts or disturb vested rights, and go only to confirm rights already existing, to cure defects, to advance the remedy, and add to the means of enforcing existing obligations. Kent, Lecture 20.

Remedial statutes.

[s] See the judgment of Westropp, C. J., in the matter of Ratansi Kalianji, I. L. R., 2 Bom. (F. B.), 148, 180.

[t] Act I of 1848 enacted that "all agreements by way of gaming or wagering shall be null and void, and *no suit shall be allowed in any Court* for recovering any sum of money or valuable thing alleged to be won on any wager, or entrusted to abide the event of any game, or on which any wager is made." In interpreting this provision, the Privy Council observed that this legislative Act is not to be construed as affecting existing contracts; at all events not those contracts on which *actions* have already been commenced, for statutes are *primâ facie* deemed to be *prospective only*, and there are no words in the Act sufficient to show the intention of the Legislature to affect *existing rights*. (Doolubdass *v.* Ramloll, 5 Moore's I. A., 109, at p. 126).

Right of action not affected retrospectively.

An inchoate or a merely contingent right is not a vested right. [I. L. R., 2 Bom., (F. B.), at p. 170]. But see Mahabir *v.* Gungadhur, I. L. R., 14 Calc., 599 (in which it was held that an *inchoate* right to foreclose a mortgage in a particular manner, arising out of proceedings *commenced* under Reg. XVII of 1806, was a right which could not under sec. 2 of the Transfer of Property Act be affected by that Act); and compare the remarks of Mitter and Beverley, JJ., in Umesh Chunder *v.* Chunchun, I. L. R., 15 Calc., 357. An existing right (to insist upon a *partition* in preference to a *sale* and distribution of proceeds) under an unexecuted *decree* is a vested right which cannot, under this rule, be affected by a new statute. (I. L. R., 2 Bom., at p. 176). A right to execute a decree which is in force at the time when a new act is passed is also a right which should not ordinarily be affected by the new Act. (*Ibid.*, 172). See also Icharam *v.* Govindram, I. L. R., 5 Bom., 653.

Inchoate rights.

Right to *execute* a decree.

The stringent provisions of the Succession Certificate Act, VII of 1889, have, *independently* of the General Clauses Act, been interpreted to be *prospective* only. They do not apply to pending proceedings.

Independently of Act I of 1868.

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Postponement of the operation of a law.

Where a statute does not come into force at once, but is postponed for some time, the hardship of a retrospective law may be considered to have been contemplated and provided for by the Legislature, and such a postponement *may* induce the Courts to hold the statute to be retrospective.[9] But as to transactions passed and closed, as to "anything done" under the old law conferring a right or title, or as to "proceedings commenced" under the old law, the deferring of the operation of the new statute is not by itself a sufficient ground for giving it a retrospective effect.[10]

How far a law of limitation may be presumed to be retrospective.

Statutes of Limitation (as distinguished from Prescription) are generally regarded as Acts regulating procedure[1]; but even such statutes ought not, *in the absence of a clear indication to the contrary*, to be retrospectively construed,[2] so as altogether to deprive a plaintiff of a vested right of action or proceeding,[3] or to deprive a defendant of any right to treat the claim against him as *already barred*.[4]

Succession Certificate Act, not retrospective.

(Babubhai Nasar, I. L. R., 15 Bom., 79). In Rama Rau *v.* Chellayamma, I. L. R., 14 Mad., 458, Ayyar and Parker, JJ., came to the same conclusion, but they relied on the General Clauses Act, as well as on the Bombay case, for their decision. It has been already observed that *strictly* speaking sec. 6 of the General Clauses Act applies to changes in the law effected by the mere *repeal* of an old Act or Regulation, and that it does not apply to changes introduced by substantive enactments in the new law. In Ammanna *v.* Gurumurthi, I. L. R., 16 Mad., 64, the learned Judges rely on English cases and do not refer to the General Clauses Act. In this last case Ayyar, J., says a plaintiff has a vested right to a decision in accordance with the law as it existed when the suit was instituted. This statement of the rule of interpretation would *seem* to be based on sec. 6, Act I of 1868, unless it is read together with the *exception* as to rules of procedure and practice to which the learned Judge refers in an earlier part of his judgment.[c]

[9] Maxwell, p. 197; Towler *v.* Chatterton, 6 Bing., 258.

Statutory power, after repeal.

[10] Sitaram Vasudeb *v.* Khanderao Balkrisna, I. L. R., 1 Bom., 286, 294; and *In re* Ratansi, I. L. R., 2 Bom., 148, 162. So again, if a statutory *power* (to avoid incumbrances) *is not exercised before* the repeal of the statute, it cannot ordinarily be exercised *after* the repeal. Assanoollah *v.* Obhoy Churn, 13 W. R., P. C., 24.

[1] Ruckmobayee *v.* Lallubhoy Muttichand, 5 Moo. I. A., 2. But see a *dictum* of Holloway, J., in Tamburatti *v.* Verarayan, I. L. R., 1 Mad., 228, 235.

[2] *Per* Westropp, C. J., in I. L. R., 2 Bom., 148, 171, quoting the Delhi and London Bank *v.* Orchard, L. R., 4 Ind. App., 127; (S. C.) I. L. R., 3 Calc., 47.

[3] Jackson *v.* Wooley (8 E. and B., 784), as explained in Pardo *v.* Bingham (L. R., 4 Ch. App., 735), both of which cases are cited at p. 198, I. L. R., 2 Bom.

[4] Abdul Karim *v.* Manji Hansraj, I. L. R., 1 Bom., 295; see also 7 Mad., 283, 288, 298; Narsing Doyal *v.* Harihar, I. L. R., 5 Calc., 897.

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But they may be retrospectively construed so as only to shorten or lengthen the *period* of limitation for unbarred causes of action accruing before they come into operation.[5]

Periods of limitation may be affected retrospectively.

When the retrospective application of an adjective law (including a law of limitation) would destroy a vested right (such as a right to revive an abated suit), or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then such law is not, any more than any other statute, to be construed retrospectively. This rule applies with greater force to a law which (like sec. 108 of Act XII of 1879) came into force from the moment of its being passed.[6] (Cf. I. L. R., 11 All., 408).

Procedure destroying right or inflicting hardship.

The *abolition* of an *exemption*, on the ground of a particular *disability* to sue (such as plaintiff's absence or imprisonment) recognised by a repealed statute, has, where the language of the new law is general, been construed retrospectively, so as merely to shorten the *period* of limitation for enforcing a right.[7]

Abolition or introduction of *exceptions*, how far retrospective.

But the *abolition* of a mode of *renewing* the period of limitation by a positive act *inter partes* (such as an acknowledgment or payment by *any one* of several co-contractors), in the absence of a clear indication of the intention of the Legislature, has not been construed retrospectively. For such a construction *deprives* a plaintiff of his right of action as *revived* in its *entirety* by an acknowledgment or payment which took place before the abolition.[8] The *introduction*

Abolition of a mode of renewal.

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[5] Sitaram *v.* Khanderao, I. L. R., 1 Bom., 286, 295, 303, 306, 307. But in Venkatachela *v.* Appathorai, I. L. R., 8 Mad., 134, Turner, C. J., and Hutchins, J., held that a suit to establish the plaintiff's right after an adverse order under sec. 269 of Act VIII of 1859, although not barred at the date when the law repealing the section came into operation, would be barred if brought after the period allowed by the repealed section, and that the new law (Acts X and XV of 1877) *did not* lengthen or otherwise affect the period of limitation prescribed by the repealed section. See pp. 202, 203, 208, note 6*a*, *supra*.

Case where rule *not* followed.

[6] Khusal Bhai *v.* Kabhai, I. L. R., 6 Bom., 26. But cf. note, p. 205, *supra*. A Division Bench of the Calcutta High Court goes further, and, on the authority of Westropp, C. J., lays down that the rule as to the retrospective operation of laws of procedure applies only where they do not *in any way prejudice* any of the parties to the suit—Behari Lall *v.* Gobordhone, I. L. R., 9 Calc., 446. But Westropp, C. J. (in Ratansi, I. L. R., 2 Bom., 148), does not, at least in so many words, say so. Indeed, there is in one sense an element of retroactivity in all laws, since no law can operate except by changing or controlling what would else have been different capabilities, or a different sequence of acts and events having their roots and motives in the past. (*Per* West, J., at p. 210, I. L. R., 2 Bom.)

A *too* broad statement of the rule.

[7] Pardo *v.* Bingham, L. R., 4 Ch., 735 ; and Maxwell, pp. 198-9.

[8] Jackson *v.* Wooley, cited at p. 198, I. L. R., 2 Bom.

But the clear and precise language of sec. 18, Act XIV of 1859, rendered payments and *oral* acknowledgments made before 1862

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Introduction of a new mode of renewal.

of a mode of interrupting the statute by a positive act *inter partes* has, on the other hand, been construed retrospectively so as to enlarge the *time* of limitation by a positive act of acknowledgment or payment satisfying the requirements of the statute, although done before the passing of the statute.[9]

(Reg. II of 1805 applied to *pending* proceedings).

Upon a construction of the *particular words* of Reg. II of 1805, sec. 3, which for the first time excepted cases of possession obtained by violent or fraudulent means from the operation of the twelve years' rule of limitation, the benefit of the exception was given to a plaintiff whose suit had been instituted while the old law[10] had been in force for only two years, and was pending in appeal when the new law came into operation.[1]

The retrospective operation of Act XIV of 1859.

The terms of sec. 18, Act XIV of 1859, as modified by Act XI of 1861, expressly rendered the provisions of Act XIV applicable to all suits instituted after the 1st of January 1862, and inapplicable to suits instituted before that date. Accordingly, the provisions as to disability, verbal acknowledgments of liability, part payments or payments of interest which would have given the plaintiff a *longer period* or a *fresh start* under the old law, were of no avail if the suit was instituted after the 1st of January 1862, when Act XIV of 1859 came into operation. In such cases Act XIV of 1859 had retrospective effect on events and transactions which had taken place before the Act had come into operation.[2] The

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(Act XIV of 1840 applied to *pending* proceedings).

ineffectual under Act XIV of 1859. Act XIV of 1840, which extended to the Supreme Courts in India the provisions of 9 Geo. IV, c. 14, about acknowledgment of debts (see p. 48, *supra*), was considered applicable to a suit which was *pending* at the date of the passing of the Act. (E. I. Co. *v.* Odit Churn Paul, 5 Moo. I. A., 43). The provisions of sec. 6, Act I of 1868, it should be remembered, apply to Acts passed by the Governor-General of India in Council since January 1868.

[9] Vincent *v.* Wellington, Long and T., 456; Darby and Bosanquet, p. 160. See p. 214, *infra*.

[10] Reg. III of 1793, sec. 14; and Reg. II of 1803, sec. 18.

[1] Lall Dokul Sing *v.* Lall Rooder Pertab, &c., 5 W. R., P. C., 95. In this case the general question whether, where an act of Limitation has been repealed, that repeal, taking place at a period in a suit between its commencement and its final determination, is or is not to affect the decision on appeal, the original decree in the suit having been passed before the repeal, was raised, but not entered into by their Lordships. If the question is now raised, it will *prima facie* be answered in the negative. See 6 Ad. and E., 951, Brown on Limitation, p. 684, and Rule XV, *supra*.

[2] As to *disability*, see Annandi Kowar *v.* Thakoor Panday, 4 W. R., Mis., 21; and Radhamonee Dasi *v.* Goluckchunder Chakerbutty, 1 W. R., 52: as to *oral acknowledgment*, see Doyle *v.* Edoo Gazee—Suth., S. C. C. Ref., p. 145; and Chamar Ullah Sirdar *v.* Lokenath

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hardship of an *ex post facto* law in those cases was sufficiently provided for by the postponement of the operation of the Act. But on *general principles*,[3] Act XIV of 1859 could not affect any title *acquired*, or revive any right to sue, *barred*, under the old Regulations, at or before the date when the Act came into operation.

Operation of Act IX of 1871.

The language of sec. 1, cl. (*a*), Act IX of 1871, distinctly made the Act inapplicable to suits actually[4] instituted before the 1st of April 1873, and there was sufficient indication in the Act itself that the Legislature intended that from the day to which its operation was *deferred*, it should regulate the bringing of suits on causes of action which had accrued, or transactions which had taken place, before that date.[5]

Applications for execution.

Act XV of 1877. Applications for execution.

An application for the execution of a decree being an application or a step in the *suit* in which the decree was obtained, and the reasons for not applying the new rules of limitation to suits commenced before the 1st day of April 1873 being of equal force with regard to applications for the execution of decrees obtained in such suits, it has been held that under sec. 1, cl. (*a*) of Act IX of 1871, applications for execution of a decree obtained in a *suit instituted before* that day, are governed by the old law.[6] The operation of Act XV of 1877 was postponed to the 1st day of October 1877, but there is no express provision in that Act similar to cl. (*a*), sec. 1 of Act IX. And the word "suit" is expressly defined by Act XV as not including an "application." And as an application for execution initiates a *new* set of proceedings, an application for the execution of a decree obtained in a suit instituted

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Halder, *ibid.*, p. 40: as to *payments*, see Ramnarain *v.* Bhugwan, *ibid.*, 92: as to the effect of applications for execution made after 1859, but before 1862, not being *bonâ fide* applications as required by Act XIV, see Rajah Satyasaran *v.* Bhyrub, 11 W. R., 80.

[3] Sitaram *v.* Khanderao, I. L. R., 1 Bom., 286; see also I. L. R., 2 Bom., p. 171, and sec. 2, Act XV of 1877. But cf. note (10), p. 214, *infra*.

[4] Joyram Loot *v.* Pani Ram Dhoba, 8 C. L. R., 54.

[5] Abdul Karim *v.* Manji Hansraj, I. L. R., 1 Bom., 295; Ram Chunder *v.* Soma, cited I. L. R., 1 Bom., 305. See also Madhavan *v.* Achudda, I. L. R., 1 Mad., 301. For a similar construction of 3 and 4 Will. IV, c. 27, see Angell *v.* Angell, 9 Q. B., 328; and Wilberforce on Statutes, p. 162. In the New York Statute of Limitation (sec. 45) causes of action which accrued before the statute came into operation are *expressly* exempted.

[6] Mungul Persad *v.* Girijakant, I. L. R., 8 Calc., 51, P. C. This ruling does not apply to *new* applications for the execution of such decrees, made *after* Act XV of 1877 came into operation. Bacharam *v.* Abdul, I. L. R., 11 Calc., 55.

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before the 1st of October 1877, if made after the 1st of October, is not a *proceeding commenced before* that date. Such an application would, therefore, be governed by Act XV of 1877, and not by the repealed Act of 1859 or of 1871.[7]

Acknowledgments and payments made before.

In suits instituted on or after the 1st of April 1873, the new provisions of Act IX relating to *payments* by the debtor or his agent, or *acknowledgments* of liability signed by the debtor's *agent*, operate retrospectively upon payments and acknowledgments made before the Act came into operation, although such payments and acknowledgments were of no avail at the date when they were made.[8]

Mohesh Lall v. Sumpat Koeri discussed.

In one case a Division Bench of the Calcutta High Court held that in suits brought on or after the 1st of April 1873, such new modes of interrupting the statute serve even to revive debts which, according to the provisions of the old law, had been *already barred* before that date.[9] In that case the suit was instituted when Act IX of 1871 was in force, and the question was whether the right to bring the suit—*i.e.*, the *remedy*—having been actually barred under the former Act of 1859, could be revived by the acknowledgment of an *agent* of the defendant made before Act IX was passed. Such acknowledgment was insufficient under the Act of 1859, but sufficient under the Act of 1871, to give a new start. This question was answered by the Judges in the affirmative on the ground that the *obligation* had *not* been *extinguished* by Act XIV of 1859. The *dicta* of Mr. Justice Holloway[10] (not concurred in by Morgan, C. J.) support this view of the case, but

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[7] Gurupadapa v. Virbhadrapa, I. L. R., 7 Bom., 459; Jugmohun v. Luchmeessur, I. L. R., 10 Calc., 748. This last case overrules Behary v. Goberdhone, I. L. R., 9 Calc., 446. In Hurrosundori v. Bhojohari, I. L. R., 13 Calc., 86, Wilson, J., expressed an *opinion* that applications for execution were *parts* of the proceedings in a suit, and as such would, under sec. 6 of the General Clauses Act, 1868, be governed by the law which prevailed at the time of the institution of the *suit*. But in Debnarain v. Narendra Krishna, I. L. R., 16 Calc., 267, Wilson, J., in delivering the judgment of the Full Bench, adopted the ruling in the first two cases. See note 9, pp. 203, 204, *supra*.

[8] Teagaraya Mudali v. Mareffa Pellai, I. L. R., 1 Mad., 264. See also the judgment of Holloway, J., in Valia Tamburatti's case, I. L. R., 1 Mad., 228, and of Mr. Justice Maclean in Mohesh Lall's case, 7 C. L. R., 121; I. L. R., 6 Calc., 340. This is in accordance with the decision in Vincent v. Wellington, cited at p. 212, *supra*.

[9] Mohesh Lall v. Sumpat Koeri, 7 C. L. R., 121; (S. C.) I. L. R., 6 Calc., 340.

[10] In Valli Temburatti v. Vira Rayan, I. L. R., 1 Mad., 229.

Turner, C. J., and Ayyar, J., in Secretary of State v. Vira Rayan (I. L. R., 9 Mad., 175, at p. 185) were also of opinion that a right to sue *barred* under the *Regulations* might be *revived* by the new law.

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none of the other cases referred to by the Calcutta High Court goes to the length of holding that a right to sue already barred could be revived by Act IX of 1871. In *Teagaraya Mudali* v. *Mariapha Pellai* (I. L. R., 1 Mad., 264), although limitation had *commenced to run* under Act XIV of 1859, the remedy was *not barred* at the date on which Act IX of 1871 came into operation, and sec. 21 of the latter Act was allowed to have retrospective effect on transactions which had taken place before that date. In *Madhavan* v. *Achuda* (I. L. R., 1 Mad., 301) also, the right to sue was not barred when Act IX of 1871 came into force. On the other hand, Chief Justice Westropp in *Abdool Karim's* case (I. L. R., 1 Bom., 295), Chief Justice Morgan in *Valia Tamburatti's* case (I. L. R., 1 Mad., 228), and Mr. Justice Pontifex in *Nocoor Chunder Bose's* case (I. L. R., 1 Calc., 328) and in *Nursing Doyal's* case (I. L. R., 5 Calc., 897), held that a remedy by suit *barred* by the existing law could not, in the absence of a clear indication of the intention of the Legislature, be revived by a new law enlarging the period of limitation, or introducing new modes of interrupting the statute.[1]

Mohesh Lall v. Sumpat Koeri discussed.

The "authentic" or legislative interpretation of Act IX of 1871 is, that "nothing in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred under any enactment thereby repealed."[2] If this declaration by the Legislature, and the rulings quoted above, had been brought to the notice of the learned Judges in *Mohesh Lall's* case, it may be presumed that they would not have come to the conclusion that a right to sue

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[1] See also Vinayak *v.* Babaji, I. L. R., 4 Bom., 230, and the judgment of Mitter and Grant, JJ., in Anando *v.* Anando, I. L. R., 14 Calc., 50, 55.

[2] *Vide* sec. 2, Act XV of 1877. The same principle is recognised by the Legislature in sec. 72, Act XVII or 1879 (Deccan Agriculturists' Relief Act), and sec. 184, cl. 2 of Act VIII of 1885 (Bengal Tenancy Act). See Dharma *v.* Govind, I. L. R., 8 Bom., 99, in which West, J., comments on Mohesh Lall's case. (*Ibid.*, p. 103).

Legislature cannot declare that a ruling was wrong in the past.

But to declare *legislatively* that certain decisions of a High Court had been *wrong* is a course which, according to Sir Alexander Miller, is inadmissible. "In the construction of an Act of Parliament, or an Act of this Legislature, it is clear that the Courts of Law are the only authority that can decide as to what is the true construction, and that where two High Courts have come to different conclusions upon the true construction of an Act, there is no authority in India which has any right to say which of the two High Courts is right and which is wrong. The Legislature can alter the law for the *future* so as to put an end to the conflict of authority without expressing any opinion as to which conclusion was right or which was wrong in the past." (Sir Alexander Miller's speech, 18th March 1892, in the Legislative Council).

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barred under Act XIV of 1859 was capable of being revived by the provisions of the Act of 1871, simply because the debt itself had not been extinguished by the repealed Act of 1859.

Generalia specialibus non derogant.

It has been already observed that a *general* later Act does not repeal, control or alter an earlier *special* or *local* one, by *mere implication*. Such an Act is presumed to have only general cases in view, and not particular cases which have been already provided for.[3] The maxim *generalia specialibus non derogant* applies.[4] Much less can any *general* Act be construed to control a subsequent particular statute. It was accordingly held that the general Law of Limitation (Act XIV of 1859), in the absence of any *express words* or *necessary implication*, did not repeal or in any way affect the limitation clauses of the Bengal Rent Law (Act X of 1859),[5] or of the Act for the adjudication of claims to property seized as forfeited (Act IX of 1859).[6] But a limitation clause in a *general* Code of Procedure has been held to be modified by a subsequent *general* Law of Limitation. Thus the exception as to disabilities

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Reason of the rule.

[3] Maxwell, p. 157. "The reason is, that the Legislature, having had its attention directed to a special subject, and observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act, where it makes no special mention of its intention to do so."—Unnoda Persaud *v.* Kristo Coomar, 19 W. R., 5, P. C.

On the other hand, it is against all genuine principles of jurisprudence to draw a *principle* from a law made in a *special* case. The *general* law is *not* altered or controlled by partial legislation made without special reference to it. Special laws must be *confined* to their special objects. An exception to a rule must not be permitted to absorb the rule. Queen-Empress *v.* Tulja, I. L. R., 12 Bom., 36, at p. 43.

Where the rule does not apply.

[4] *General* words do not derogate from *special* words. See the Collector *v.* Punniar, I. L. R., 1 Mad., 89, 110. But if there be in the general Act or in its history something shewing that the attention of the Legislature had been turned to the earlier special Act, and that it intended to embrace the special cases within the general Act, or something in the nature of either Act, to render it unlikely that any exception was intended in favor of the special Act, the maxim under consideration ceases to be applicable. (Maxwell, 2nd Ed., p. 218).

[5] Unnoda Prasad Mookerjee *v.* Kristo Kumar Moitro, 19 W. R., 5, P. C. See also Poulson *v.* Modhusudan, 2 W. R. (Act X), p. 21, F. B.

Sec. 3 of Act XIV of 1859 *partially* corresponded to sec. 6 of Act IX of 1871.

Reg. III of 1793 did not control Act XIII of 1848.

[6] Mahomed Bahadoor Khan *v.* The Collector of Bareilly, 21 W. R., 318, P. C; (S. C.) L. R., 1 Ind. Cas., 167. See also Hari Ram *v.* Vishnu, 10 Bom., 204; Musst. Nona *v.* Dhoomun, 5 N. W. P., 30. On similar grounds the exceptions recognised by sec. 14, Reg. III of 1793, were not extended to the special limitation provided for by Act XIII of 1848. See Cal. Sud. Dew., 1857, pp. 688, 1197, and Huro Chunder Chowdhry *v.* Kishen Kumar Chowdry, 5 W. R., 27.

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in the *general* Law of Limitation (Act XIV of 1859) was considered to have been incorporated with the limitation clause in sec. 246 of the *general* Act VIII of 1859.[7]

The sixth section of Act IX of 1871 was founded on the general maxim quoted above. It expressly saved special and local laws "now or hereafter to be in force," so that whether the general Limitation Act was *later* or *not*, its provisions could not be imported into any local or special law. And after the passing of that Act it was held[8] that the provisions as to disability contained in that or any other Act could not apply to a suit under the special Act XXV of 1857, sec. 9. Similarly, the provision in sec. 5 of Act IX, as regards the period of limitation expiring on a day when the Court was closed, was considered to be inapplicable to suits for arrears of rent under Act VIII of 1869, B. C.[9]

Sec. 6, Act IX of 1871. Special or local laws not affected.

It has been held that the language of sec. 6, Act XV of 1877, has introduced a change in the law as stated in the cases referred to above. Under Act IX of 1871, the rule was that special and local *laws* of limitation were not to be affected by the general law; but under Act XV of 1877 the rule is that the *periods* of limitation prescribed by special or local laws shall not be altered or affected by the general law. This raises an *inference* that the Legislature intended that the *general provisions and exceptions* contained in Act XV of 1877 should be applicable to suits, appeals or applications governed by special or local laws of limitation.[10]

Sec. 6, Act XV of 1877. Special *periods* of limitation not affected.

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[7] Musst. Phoolbas Koer *v.* Lalla Jogeshur, 25 W. R., 285, P. C.; I. L. R., 1 Calc., 226. See also Moro *v.* Visaji, I. L. R., 16 Bom., 536.

[8] Thakur Kapilnath *v.* The Government, 13 B. L. R., 445; 22 W. R., 17.

[9] Paran Chunder *v.* Mutty Lall, I. L. R., 4 Calc., 50; 2 C. L. R., 543. See also Woomesh *v.* Soorjee, I. L. R., 5 Calc., 713; Timal *v.* Ablakh, I. L. R., 1 All., 254; Thirsingh *v.* Venkata, I. L. R., 3 Mad., 92. It may be observed that Act VIII of 1869 was passed by the local Bengal Legislature, and not by the general Indian Legislature, and it is but reasonable to expect that any modification of such an enactment by a general Limitation Act should be apparent on the face of the general law. Act X of 1859, it will be remembered, was passed by the *same* Legislature which passed Act XIV of 1859. The principle of the rule of interpretation adverted to above, therefore, applies with greater force to Act VIII of 1869, B.C., than to Act X of 1859.

[10] But the provisions of sec. 7, Act XV of 1877, relating to *legal disability* are, by the *terms of the section*, applicable only to suits for which a period of limitation is prescribed by that *general* Act. Sec. 185 of the Bengal Tenancy Act, VIII of 1885, *expressly* enacts that secs. 7, 8 and 9 of Act XV of 1877 shall not apply to suits or applications specified in Sched. III of Act VIII of 1885, and that other provisions of Act XV of 1877 shall apply to such suits and applications.

Sec. 7, Act XV, not applicable to suits under special or local laws.

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Secs. 5, 12, 14, 18 and 19 of Act XV applied to suits under special or local laws.

Accordingly, the general provision of sec. 5, Act XV of 1877 (as regards the period of limitation expiring on a day when the *Court is closed*), has been applied to suits under Act VIII of 1869, B.C.,[1] and to suits under sec. 77 of the Registration Act, III of 1877.[2] Similarly the general provisions of sec. 12, Act XV (as to exclusion of time occupied in obtaining copies of decrees, &c.), and of sec. 19, Act XV (as to acknowledgments of liability), have been considered applicable to applications and suits under Act VIII of 1869, B.C.[3] And the provisions of sec. 14, Act XV, have been applied to suits under the Registration Act.[4] The provisions of sec. 18, Act XV, have similarly been applied to suits under the Special Madras Act, II of 1864.[4a] But as these general provisions and exceptions

But these sections *do* affect the periods of limitation.

modify[5] the periods of limitations prescribed by local and special Acts, they may be said to "affect," if not to "alter," those periods. And although the corresponding section of Act XIV of 1859 (sec. 3) referred to the *periods* of limitation only, the general provisions of that Act were held by the Privy Council to be inapplicable to suits for which a (shorter) period of limitation had been prescribed by a special Act.[6] Besides, under the well-established rule of construction to which we have referred, a mere *inference*, unless it is a necessary one, is not sufficient to rebut the presumption that the Legislature does not intend by a *general* enactment to interfere with a *special* one.[7] On the other hand, it should be remembered that Act XV

Upon the strict construction of sec. 7, Act XV of 1877, *as well as* upon the provisions of sec. 6 of the same Act, it has been held by Tottenham and Ghose, JJ., that in a suit for arrears of rent, which accrued during *minority*, the plaintiff is not entitled to a fresh period of limitation. (Girija *v.* Patani, I. L. R., 17 Calc., 263, 267).

[1] Golap Chand *v.* Kristo, I. L. R., 5 Calc., 314 (L. S. Jackson and McDonnel, JJ.); Khoselal *v.* Gunesh Dutt, I. L. R., 7 Calc., 690.

[2] Nijabutollah *v.* Wazir Ali, 10 C. L. R., 333; I. L. R., 8 Calc., 910.

[3] Beharilall *v.* Mungolanath, I. L. R., 5 Calc., 110, as to the applicability of sec. 12, Act XV. See Parbuttinath *v.* Tejmoy, I. L. R., 5 Calc., 303, as to sec. 19, Act. XV.

[4] Khetter *v.* Dinabashy, I. L. R., 10 Calc., 265.

[4a] Venkata *v.* Chengadu, I. L. R., 12 Mad., 168, F. B.

[5] Musst. Phoolbas *v.* Lall Joggeshur, 25 W. R., 285, 288, P. C. The general provisions of Act XV of 1877 have the effect of *altering the periods* prescribed by special Acts. (Girija *v.* Patani, I. L. R., 17 Calc., 263, at p. 265). The correctness of the decision in I. L. R., 10 Calc., 265, has been questioned on the ground mentioned in the text. See pp. 266-7, I. L. R., 17 Calc.

[6] Unnoda Persaud *v.* Kristo Coomar, 19 W. R., 5, P. C.; Mahomed Bahadoor *v.* The Collector, 21 W. R., 318, P. C. See also Hariram *v.* Vishnu, 10 Bom., 204.

[7] Unnoda Pershaud *v.* Kristo Coomar, 19 W. R., 5, 6, 7, P. C.

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expressly provides (see sec. 1) that secs. 2—25 shall not apply to suits under two *particular* special laws, *viz.*, Act IV of 1869, and Mad. Reg. VI of 1831. It may therefore be argued that it was the intention of the Legislature to make secs. 2—25 applicable to suits under *other* special laws.*

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* Against this *inference* (taken by itself) it may be remarked that sec. 1 of Act IX also made a similar express provision, and notwithstanding such provision, it was held that the general provisions of Act IX did *not* affect suits under *any* local or special law.

Other rulings on the interpretation of sec. 6, Act XV.

But as regards Act XV, see further the case of Rama Raw *v.* Venkatisa (I. L. R., 5 Mad., 171, F. B.) In this case, the Judges of the Madras High Court were of opinion that sec. 19, Act XV of 1877, *was applicable* to summary applications under *special* and *local* laws. See also Guru Charya *v.* President, I. L. R., 8 Bom., 529, as to the applicability of sec. 14, Act XV; In the matter of a reference under the Madras Forest Act, I. L. R., 10 Mad., 210, as to the applicability of sec. 5, cl. 2, Act XV; Seshama *v.* Sankara, I. L. R., 12 Mad., 1 (sec. 14, Act XV); Venkata *v.* Chengada, I. L. R., 12 Mad., 168 (sec. 18, Act XV); Kullayappa *v.* Lakshmipathi, I. L. R., 12 Mad., 467 (sec. 14, Act XV). The rulings of the Calcutta High Court on the interpretation of sec. 6, Act XV of 1877, would thus appear to have been generally adopted. But in 1889 Tottenham and Ghose, JJ., questioned the correctness of at least one of the Calcutta decisions. (See notes 5 and 10, *supra*). In 1891, the question of the effect of sec. 6, Act XV of 1877, was again discussed before a Full Bench of the Calcutta High Court. But the learned Judges did not find it necessary to decide it. The Full Bench simply held that the general provisions of Act XV do not apply to suits under Act X of 1859, which, where it is still in force, is a *complete* code in itself. Nagendro *v.* Mathura, I. L. R., 18 Calc., 368.

But see *two* cases in 1889 and 1891.

Rulings, *not* adopted by Legislature.

As the *general provisions* of Act XV are, according to the *current* of rulings applicable to suits and applications under *all* special and local laws, the Legislature need not have *expressly* extended those provisions or some of them to suits under *certain* special Acts. (See sec. 23, Act XVIII of 1881, the Central Provinces Land Revenue Act; and sec. 185 of the Bengal Tenancy Act, VIII of 1885). See also sec. 18, cl. 2, of the Lower Burma Courts Act, XI of 1889. These *enactments* shew (to a certain extent) that the Legislature has *not* adopted, at least, some of the *rulings* referred to above.

The Limitation clause in any section of the *general* Civil Procedure Code is, of course, affected by the provisions of the *general* Limitation Act. Thus the provisions of even sec. 7, Act XV of 1877, have been *practically* incorporated with sec. 230 of Act XIV of 1882. (See p. 217, *supra*, and Moro *v.* Visaji, I. L. R., 16 Bom., 536).

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LECTURE VIII.

THE STARTING POINT OF LIMITATION—THE PERIODS OF LIMITATION—THE OPERATION OF ACT XV—GENERAL RULES AND EXCEPTIONS AS TO THE APPLICATION OF THE PERIODS OF LIMITATION.

Accrual of right to sue (art. 120)—In actions on contracts (art. 115)—Where there are successive breaches—Where there is a continuing breach (sec. 23)—Where no time is specified—Where money is payable on demand—In actions for torts (art. 36 and sec. 24)—Where there has been a continuing wrong (sec. 23)—Where there has been an illegal proceeding—In actions on *quasi*-contracts—Instances of defendant's refusal being the cause of action—Cases where the plaintiff's knowledge is an element of the cause of action—Knowledge, and means of knowledge—Date of accrual of right to sue, not always identical with *terminus a quo*—*Terminus ad quem*—Periods of limitation—The 28 sections of Act XV—Operation of the Act as to time, sec. 2—Operation as to place, secs. 1, 6 and 11—Operation as to persons—Operation as to subjects—Preamble, secs. 1, 6 and 10—Rules and exceptions—First Rule, explanation and proviso, secs. 4 and 22—Second Rule, complement and proviso—Sec. 25; Act I of 1868, and art. 85, Sched. II—Third Rule, sec. 12—Fourth Rule, sec. 9—Sec. 9 explained and illustrated—Proviso to the 4th rule explained—Prevention, suspension, and interruption of the operation of limitation, explained and illustrated—Fifth Rule, sec. 23 and arts. 19, 23, 42, 115 and 116—Sixth Rule, sec. 24 and art. 25—Exceptions to the application of the periods of limitation.

THE third column of Sched. II, Act XV of 1877, *specifies* the events from which limitation runs in the cases mentioned in the first column. The *general* article (No. 144), relating to suits for the possession of *immoveable* property, or any interest therein, not otherwise specially provided for, makes limitation start from the time when the *possession* of the defendant becomes *adverse* to the plaintiff. The question of *adverse possession* has already been considered. But there is a still more *general* article, No. 120, (relating to suits for which no period of limitation is specially provided in Sched II), which makes the time when the *right to sue* accrues, the starting point of the period of limitation. The question "when does the right to sue or the cause of action accrue" requires some notice here. It may be laid down that, in general, "the cause of action arises when and as soon as the party has a right to apply to the proper tribunals for relief," and that the infringement of the plaintiff's (substantive) right gives him a right to apply for relief.[1]

Accrual of right to sue, or cause of action.

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[1] Angell, para. 42; Jardine, Skinner & Co. *v.* Ranee Shamasoonderi, 13 W. R., 196. A cause of action consists of the circumstances and

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The right to bring an action may arise on various events; but it has always been held that (in the absence of an express provision) limitation runs from the *earliest* time at which an action *could be brought*. (*Per* Lindley, L. J., in *Reeves* v. *Butcher*, 1891, 2 Q. B., 509, at p. 511). The right to sue, however, has been held to be *revived* by reason of a previous *satisfaction* of the claim being *nullified* by a decree between the parties. Time begins to run when the cause of action first accrues, but when the claim is satisfied by a sale of the debtor's property or by an agreement to sell his property, the right to sue is *suspended*; and so long as the satisfaction of the claim is not rendered nugatory by the sale or the agreement being declared by a decree to be void, the plaintiff is precluded from bringing a suit, and the defendant may allege that he is absolved from all liability. But when such a decree is passed, it brings about a new state of things, and gives the plaintiff a *fresh* cause of action.[1a]

The *earliest* time when plaintiff could sue.

Revival of a suspended right to sue.

In cases of contracts, the date of the nativity of the right of action (*actio nata*) is, generally speaking, the date of the *breach* of contract, and, except where the right to sue is fraudulently concealed by the defendant, not the time when *knowledge* of the breach first comes to the plaintiff.[2] The time at which the *damage* arising from the breach occurs,

Accrual of right in actions on contracts (art. 115).

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facts which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief or to some part of the relief prayed for. The plaintiff's alleged cause of action is to be sought for within the four corners of the plaint—Jibunti *v.* Shibnath, I. L. R., 8 Calc., 819, Nonoo *v.* Anond, I. L. R., 12 Calc., 291. In order to ascertain whether a suit is barred or not, we must look to the nature of the case which the *plaintiff* makes—Mylapore *v.* Yeo Koy, I. L. R., 14 Calc., 801, 805, P. C.

Cause of action as stated in the plaint.

It may be here observed that a statement in the plaint as to the time when the cause of action arose does not absolutely bind the plaintiff—Fuckeruddeen *v.* Mohima, I. L. R., 4 Calc., 529, 531. See also Phillips *v.* Nundo, 8 W. R., 385.

[1a] See Ranee Surnomoyee *v.* Shoshi Mukhee, 11 W. R., P. C., 5; Basu *v.* Dhumsing, I. L. R., 11 All., 47, P. C., and p. 188 (note), *supra*.

[2] Rajah Indro Bhusun *v.* T. J. Kenny, 3 W. R., S. C. Ct. Ref., 9; and sec. 18, Act XV of 1877; Roscoe's Digest, 613; art. 115, Sched. II. A similar rule applies to actions of *tort* as well as to *other* cases. (See Azrool *v.* Lalla, 8 W. R., 23).

Where it was expressly stipulated that the bond or the loan pass book given by the debtor must be produced by the creditor before the former would repay the debt or any part thereof, it was held that the loss of the bond and consequent non-production of the same by the creditor prevented the accrual of the cause of action and the running of time against him. (Atkinson *v.* Bradford, 25 Q. B. D., 377). The production of the document was treated as a *condition precedent* to the liability of the debtor. (See also Manoel *v.* Hongkong Bank, I. L. R., 14 Bom., 498).

Production of document sometimes a condition precedent.

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Where there are *successive* breaches.

also, does not affect the starting point of limitation.[3] Where there are *successive* breaches, as, for instance, in the case of non-payment of a bond payable by instalments, a fresh right to sue accrues upon every fresh breach, so that time may be a bar to the suit for the earlier breaches without affecting the suit for the subsequent ones.[4] Where the breach is a *continuing* one, as in the case of a tenant neglecting, in violation of his covenant, to keep the demised premises in repair, a fresh right to sue arises at every moment of the time during which the breach continues.[5] The cause of action in this case is said to be renewed *de die in diem*—that is, renewed from day to day; and the suit is absolutely barred, only by the lapse of the prescribed period from the time when the breach *ceases* to exist.[6] But every breach *persisted* in by the obligor is not a *continuing* breach. Mr. Shephard, in his work on the Limitation Acts, observes that the rule as to continuing breaches applies only to "contracts obliging one of the parties to adopt some given *course* of action during the *continuance* of the contractual relation." The relation between the contractor and contractee must *continue* to exist for *some time*, as in the case of partners, landlords and tenants, principals and agents, bailors and bailees; and "the matter to which the defaulting party is obliged should *not* consist of doing *specific* acts at *stated times*," such as paying rent every quarter, or rendering accounts every six months.[7] The non-payment of rent every quarter, and the non-render of accounts every six months, are *successive* breaches of contract. In either case *each act, or omission*, though the same in kind, is *distinct and complete* in itself.

Where there is a *continuing* breach of contract (sec. 23).

Continuing and successive breaches, distinguished.

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[3] Darby and Bosanquet, p. 24; Battley *v.* Faulkner, 3 B. and Ald., 288. In *certain* cases of *torts*, the resulting *damage* gives the right of action. In the case also of *covenants* of a *continuous* nature, Kelly, C. B., was of opinion that it was the ultimate resulting damage, and not merely the breach, which gave the right of action. (Spoor *v.* Green, I. L. R., 9 Ex., 99; Banning, 176-181). Sections 23 and 24 of Act XV of 1877 provide for these cases in British India.

[4] Art. 115; art. 74; Darby and Bosanquet, p. 100.

[5] Sec. 23, Act XV of 1877; Darby and Bosanquet, p. 100.

[6] See art. 115, Sched. II, Act XV.

[7] See Shephard on Limitation, pp. 48, 49. The non-payment of a promissory note payable on demand, or of a debt due, is not a *continuing* breach. (Mansab *v.* Gulab, I. L. R., 10 All., 85, 92). The persistent refusal of a purchaser to take delivery of goods purchased is also not a *continuing* breach. (Shephard). Where the covenant is in the nature of an agreement to do a thing *toties quoties*, *as often as* the exigency of the case may require, a breach of it may be a continuing breach. In the case of a covenant for title there is a continuing breach so long as the vendor has not a good title (Kingdon *v.* Nottle, 1 M. & S., 355) that is so long as an *adverse* title exists. (Mansab *v.* Gulab, I. L. R., 10 All., 85, 91). The breach continues as long as the vendee

Agreement to do a thing *toties quoties*.

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Where no time is specified for performance.

Where the time for the performance of the contract is not determined by the contract itself, where it is not a case of a promise to do anything at a *specified* time, or upon the happening of a *specified* contingency, where performance is due as soon as the creditor or obligee may desire it, the rule of English law (which, notwithstanding Austin's protest, has been adopted by the Indian Legislature) gives the creditor or obligee an *immediate* right to sue, as in the case of goods sold without any specific credit, of money lent generally, or of money *lent* under an agreement that it should be payable *on demand*.* Vaugerow and Savigny hold opposite opinions on this subject. (Poste, Gaius, p. 583).

Covenant for title. Breach, continuing or not.

does not enjoy the land under a good title. (Addison on Contracts, ch. 22, sec. 1). The breach of a covenant for title may *continue* so long as there is any land with which the covenant may run and upon which it can operate. The breach *ceases* to exist upon an *eviction* of the *whole* property conveyed, so that there is no land with which the covenant may run, and nothing left upon which the covenant can operate. See the judgment of Kelly, C. B., in Spoor *v.* Green, L. R., 9 Ex., 99, 116. Green, J., however, was of opinion that a covenant for title was broken *once for all* by the existence of an adverse title at the date of the execution of the conveyance. (Raju Balu *v.* Krishnarav, I. L. R., 2 Bom., 273, 293). And according to Edge, C. J., Straight, J., and Mahmud, J., the breach of a covenant for title occurs when the deed is executed, provided it is found that at that time the defendant had got no title to the land conveyed by him. (Hari *v.* Raghunath, I. L. R., 11 All., 27, 30, F. B.) But a covenant to *provide* for what might happen in case of either of the parties to a deed of exchange being *dispossessed* by adverse title, is *not* a covenant for title. The plaintiff may take advantage of the provision from the time when the *event* contemplated by such a covenant occurred. (*Ibid.*) Covenants for quiet enjoyment or for further assurance are other instances of continuing covenants. (Banning, 176-181; I. L. R., 2 Bom., 273, 292 *et seq.*) An agreement by a vendee to pay the vendors certain fees annually is not a continuing covenant. (Bhojraj *v.* Gulshan, I. L. R., 4 All., 493). A covenant by a lessee *not to sublet* the premises is also not continuing. (Walrond *v.* Hawkins, L. R., 10 C. P., 342; Starling, p. 68). But a covenant by a tenant to insure the premises is capable of a continuing breach. (Doe *v.* Gladwin, 6 Q. R., 953; Starling, 68). An apprentice goes away before his time, whereby the plaintiff loses his service for the unexpired term. A *fresh* action will lie against the apprentice for every *day* he remains absent—11 A. and E., 304; Mayne. An agreement by a transferor to buy off the claim of a third person to the property transferred, has been treated as in the nature of a covenant for title and quiet enjoyment. (See Imdad Ali *v.* Nijabat Ali, I. L. R., 6 All., 457).

Other covenants.

Is previous *demand* necessary to recovery of deposits.

* Austin, Lecture 25; art. 52, art. 57, and art. 59, Sched. II, Act XV. According to Austin, in these cases (as well as in cases of deposits), a previous actual demand is necessary, for without it the *debtor* cannot *know* that he is breaking his obligation. But in Evans's Digest of the Statutes it is pointed out that in these cases (as *distinguished* from cases of *deposits* returnable on demand) there is an immediate duty, and that it is a perfectly legitimate conclusion that no demand can be necessary in addition to the duty itself. The Indian Legislature distinguishes *money deposits* from loans. See arts. 59 and 60

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Where money is payable on demand.

Austin, Holloway, J., Innes, J., and Savigny.

The following passage from the Abstract of the Proceedings of the Legislative Council on the 19th July 1877, refers to this question: "In the case of suits for money lent under an agreement that it should be payable on demand, we had made the time run from the date of the transaction, instead of from the demand, the date prescribed by the present law,[9] the framer of which in this respect had followed a judgment of the Bengal High Court (6 B. L. R., 10), which judgment rested on what the authority[10] of Mr. Justice Holloway (*quis jure peritior ?*) emboldened Mr. Stokes to call a mistake of Austin's. It seemed unreasonable that a creditor should be able to give himself an unlimited time to sue by merely abstaining from making a demand. Moreover, as Mr. Justice Innes, one of the Judges of the Madras High Court, observed in a Minute to which the Committee were much indebted, 'it is a well-known principle of English as well as Continental law that the words *payable on demand* are not a *condition*. The creditor, by the clause, does *not* seek to impose a *conditional* obligation; he merely gives notice to the debtor that he is to be ready to pay the debt at any time when called upon. If the obligation depended upon a personal act of the creditor (as Savigny observes), it would be extinguished by his death before demand, which is not the case. Consistently with this view, it has always been held in England that a debt payable on demand was a debt from the date of the instrument, on which, therefore, the cause of action arose (*Norton* v. *Ellam*, and other cases), and that time runs from that date, and not from date of demand.' The Committee agreed with Mr. Innes in thinking it desirable that the law in India and that in England should be in accord on this point, as they were prior[1] to the enactment of Act IX of 1871."

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of Act XV. Ordinary laymen also distinguish a *loan* from a *deposit* with a banker.

May *action* precede *wrong?*

It seems paradoxical to maintain that for purposes of limitation, the right of *action* precedes the existence of a *wrong*, but Vangerow has shewn that this was so, in the case of *deposits* under the Civil law. (Poste, Gaius, 584). Art. 145, Act XV of 1877, relating to the deposit or pawn of specific moveable property adopts this rule of the Civil law.

[9] Act IX of 1871.

[10] See 7 Mad., 293, 296, 300.

On demand and *after* demand.

[1] But even prior to that date, the Bengal High Court did follow Austin in cases not governed by English law. (See Poorna Chunder *v.* Gopal Chunder, 17 W. R., 87). The *other* High Courts followed the English law—see Vinayak *v.* Babaji, I. L. R., 4 Bom., 230. Even in England, a bill or note payable *after demand* is not payable till demand is made. See note 3, p. 95, *supra*, and arts. 72 and 73 of Act XV. As to promises made in consideration of some *collateral* thing being done

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In actions for torts, not *specially* provided for in the schedule, time begins to run from the occurrence of the act or omission complained of, and not from its *discovery* by the plaintiff, nor (generally) from the time when the consequential damage ensues.* But where the consequential *damage* is the *ground of action*, where the *act itself*, *without* specific damage, does not amount to a *tort*, and give rise to a cause of action, limitation runs from the *damage* accruing, and not from the *act* complained of.* Again, in the case of a *continuing* wrong, limitation begins to run at every moment of the time during which the wrong continues.* Thus, where the defendant obstructs or diverts a watercourse or a drain, the cause of action is renewed *de die in diem*, so long as the obstruction or

In actions for torts generally.

Where *damage* is the *ground* of action.

Where there has been a continuing wrong.

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on demand, see Ramchunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 294.

* In *ordinary* cases nominal damages are *at once* recoverable. See Banning, p. 270; Collett on Torts, paragraph 418; and art. 36, and the *first* portion of art. 25, Sched. II, Act XV.

* Darby and Bosanquet, p. 30; sec. 24 and *latter* portion of art. 25, Act XV of 1877; Bonomi *v.* Backhouse, 9 H. L. Ca., 503. In this case the plaintiff owned the *surface* of a field, and the defendant the subsoil. The defendant cut away certain pillars of coal which supported the surface, without causing any immediate apparent injury to the surface. Subsequently, the surface subsided. This *subsequent* subsidence (not the original cutting away of coal), it was held, gave the plaintiff his cause of action. The defendant's *act* of cutting away coal could not have amounted to a *tort* if the surface had not subsided. He could use his *own* property in any way he pleased, so long as he did not cause any *injury to others*. *Sic utere tuo ut alienum non lædas.* The mere withdrawal of a stratum of coal, by the *owner* of the subsoil, is in itself a perfectly legitimate and lawful act, and it is only because it is done without giving proper support to the superadjacent land or doing something else which would prevent the injury to the owner of the *surface* that the cause of action arises. The *subsidence* of the surface, attributable either to the acts or default of the owner of the subsoil, is itself an interference with the enjoyment of the surface, and, as such, constitutes the cause of action of the owner of the surface. A second or further subsidence *may* give rise to a second cause of action. But as no suit would lie without damage, if the second subsidence does *not* cause to the plaintiff *fresh damage* in any true sense, such subsidence shall not give him a fresh right to sue. (*Dwarka v. The Corporation*, I. L. R., 18 Calc., 91). *All* damages which result from *one and the same cause of action* must be recovered at one and the same time. (*Ibid.*) According to Pigot, J., in the same case, the *subsidence of* the surface itself does not constitute the cause of action, the *damage* arising from the subsidence is the cause of action. (*Ibid.*, at p. 99). Although the working of the mines by the owner of the subsoil to such an extent as to cause the subsidence is the *causa causans*, there is *not a continuing wrong* because of *successive* subsidences. *Each* subsidence (provided it causes damage) is treated as a *distinct wrong*.

Case where there is *no wrong* until plaintiff is actually *endamaged*.

All damages from *one* cause of action.

Successive wrongs are *separate* causes.

* See sec. 23, Act XV of 1877. Under arts. 19, 23, and 42, Sched. II, relating to false imprisonment, injunction wrongfully obtained, and malicious prosecution, limitation runs from the *cessation* of the wrong.

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Disturbing watercourse or ferry—*continuing.*

diversion is allowed to continue.[5] The disturbance of a right of ferry is in the nature of a nuisance (*Yard* v. *Ford*, 2 Saund., 172) and the cause of action in the case of the violation of this right is a continuing wrong.[5a] But in the

Detention of property—*not.*

case of a wrongful seizure of property under a process of Court, the continued detention of the property cannot be treated as fresh causes of action from day to day.[6]

Fresh *damage*, not *generally* a fresh *cause* of *action.*

A party is not allowed to bring a *fresh* action *merely* because there has been a fresh damage, as where what was originally "simple hurt" subsequently turns out to be "grievous hurt."[7] Generally speaking, *all damages*, whether present or prospective, arising from *one cause of action*, must be recovered once for all. But where fresh damage gives rise to a *fresh cause of action*, this rule does not apply, and a *fresh suit* is maintainable.[8] So where the wrongful act is

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Suit for continuing wrong when *totally* and when *partially* barred.

[5] Rajrup Koer *v.* Abul Hossein, I. L. R., 6 Calc., 394; (S.C.) 7 C. L. R., 529; Punju *v.* Bai, I. L. R., 6 Bom., 20; Subramaniya *v.* Ramchandra, I. L. R., 1 Mad., 335. A suit in respect of a continuing wrong cannot be *totally* barred so long as the wrong continues. It may be so barred after a certain period from the date of the cessation of the wrong. While the wrong is still continuing, the plaintiff may (in cases where time does *not* run from the *cessation* of the wrong) sue for such *damages only* as accrued *within* the *period prescribed* by the law. (See Dwarka *v.* The Corporation, I. L. R., 18 Calc., 91, at p. 98). See Rules 5th and 6th, *infra.*

[5a] Nityahari *v.* Dunne, I. L. R., 18 Calc., 652.

[6] D. Hughes *v.* The Chairman, 19 W. R., 339; art. 29, Sched. II, Act XV.

Two points in respect of continuing wrongs.

The question as to what are *continuing* wrongs possesses importance in determining whether (1) a *multiplicity* of actions lies in respect of the same act of wrong, and (2) from *what date* the period of limitation begins to run. (3 Mad. Law Journal, p. 2).

Continuing wrong defined.

If the act complained of creates a *continuing source of injury* and is of such a nature as to render the doer of it *responsible for the continuance* thereof *in cases in which damage is not of the essence of the action*, as in trespass, a fresh cause of action arises *de die in diem*. (Clerk and Lindsell on Torts, p. 96; 3 M. L. J., p. 3). There is a *legal obligation* to discontinue a trespass or remove a nuisance, but there is no *such obligation* upon a trespasser to *replace* what he has *pulled down* or *destroyed* upon the land of another, though he is liable to compensate in *damages* for the loss sustained. (Clegg *v.* Dearden, 12 Q. B., 576). For *other* definitions, see p. 227, *infra.*

[7] Fitter *v.* Beale, 1 Ld. Rayne, 339-602; Underhill, p. 89; 11 App. Cas., 127, 132. "Later manifestations of the original damage done, and consequent upon the injury originally sustained, do not give rise to a new cause of action."

Two or more *distinct* wrongs or causes of actions.

[8] *Per* Cockburn, C. J., in Lamb *v.* Walker, 3 Q. B. D., 389; Darley H. C. & Co. *v.* Mitchell, 11 App. Cas., 127; I. L. R., 18 Calc., p. 98. Slander, by words not actionable in themselves, causing two distinct damages gives rise to two causes of action. Working mines under your own land may cause two *distinct* damages to your neighbour and give rise to two causes of action—11 App. Cas., 127.

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persisted in, and there is *continuing injury or tort* as well as *continuing damage*, successive actions, it would seem, might be brought *toties quoties* (as often as might be necessary).*

Actions brought *toties quoties.*

Whether there is a *continuing tort*, or merely a *continuing damage*, is often a matter of difficulty to determine. According to Mr. Underhill, the true test is whether the defendant is or is not *bound* to do or omit to do some act *over and above* the payment of the sum awarded as damages in the first suit. If he is so bound, and he neglects to do the act which he ought to do, or does the act which he ought not to do, and fresh damage results, then a new suit may be brought. Mr. Collett, in his work on the law of torts, says: "An act done upon the *land of the plaintiff*, though it may be a continuing cause of damage, is *not a continuing injury* where it is *in the power of the plaintiff alone* to abate the cause of damage." Where the nuisance is not by a single act, but by a *continuance* of the wrongful *act*, a new cause of action arises on the recurrence of every fresh damage. (Roscoe's Digest, 14th Ed., p. 692). A second action may lie even if the defendant would be a trespasser should he enter upon the land in question to remove the source of complaint. (*Thompson* v. *Gibson*; Mayne on Damages, 388; note 6, *supra*).

In continuing *wrongs* (as distinguished from continuing *damages*) successive suits are allowable.

The law does not allow a defendant to purchase a right to commit a wrong. The payment of damages or other satisfaction for the wrong complained of in the first suit does not operate as a *purchase* of the right to *continue* the injury. (*Holmes* v. *Wilson*, 10 Ad. and E., 503). *Successive* actions are therefore maintainable for a *continuing* wrong. Making an aperture in the plaintiff's mine through which the water flows continually into the plaintiff's mine is not a *continuing* wrong. The injury is committed by a *single* act done upon the *plaintiff's* property, and *he alone* can abate the cause of damage. The defendant may be compelled to pay all damages consequent upon the original injury, but he is *not* bound to stop the aperture in the plaintiff's mine. (See *Clegg* v. *Dearden*, 12 Q. B., 576). Holding out a pole over, or keeping timber on, your neighbour's land is a *continuing* trespass. (*Hudson* v. *Nicholson*, 5 M. & W., 437). Altering the roof of your own house so as to make the water from it fall on to your neighbour's house, or so as to obstruct his window, is a *continuing* nuisance. (*Shadwell* v. *Hutchinson*, 2 B. and Ad., 97; 3 Mad., 111; Shephard, 64). Converting an open ditch into a covered drain with imperfect catchpits

Right to *continue* the injury cannot be purchased.

Instances of *completed* and *continuing* wrongs.

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* Whitehouse v. Fellowes, 30 L. J. C. P., 305; Shephard, p. 64.

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Instances of *completed* and *continuing* wrongs.

(on your own land), and causing damage to plaintiff's property by the overflow of water, is a *continuing* wrong. (*Whitehouse* v. *Fellowes*, 30 L. J. C. P., 305). But if you erect a building on plaintiff's land, and *leave it there*, it is *not* a *continuing* wrong. The plaintiff alone may abate the cause of damage at once, and you are not bound to do anything more than pay damages for the original trespass. Similarly, entering upon your neighbour's land, and digging a ditch thereon, is a *completed* trespass and not a *continuing* one. (Underhill or Torts, 79). But the *continued use* of buttresses improperly erected by defendant on plaintiff's land for the support of defendant's road is a continuing trespass. (*Holmes* v. *Wilson*, 10 Ad. and E., 503). As to continuing trespasses and other wrongs, see also notes to arts. 34, 35, 39, Sched. II, and sec. 23, Act XV of 1877, in the Appendix.

Where there has been an illegal proceeding.

It is a mistake to suppose that where a proceeding is illegal, and may be a cause of action, the cause of action does not arise until the proceeding has been set aside by the Court. There may be cases in which, before an action can be brought, it is necessary to have the proceedings set aside; but where there is an entire want of jurisdiction, where the alleged wrong-doer is not acting judicially, and would have no protection from his judicial capacity, it is not necessary to wait until his illegal and unfounded proceedings are set aside.[10]

Refusal, in *quasi*-contracts and delicts.

Breaches of contracts, and violations of rights *in rem*,[1] may give rise to causes of action *without* demand and refusal. But, in general, it may be said that *quasi*-contracts and *quasi*-delicts are merely sources of obligations, the *refusal* to fulfil which is properly the cause of action.[2] So

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[10] *Per* Couch, C. J., in Hughes *v.* The Chairman, 19 W. R., 339, 341.

Torts, and breaches of *contract*.

[1] Torts, according to Austin, are violations of rights *in rem*. A tort sometimes consists in the violation of a duty *coupled with* actual resulting damage (see sec. 24, Act XV of 1877). Where a duty is imposed upon a contractor by the common law or the custom of the realm (as the duty of a common carrier *irrespective* of any contract), he is, for breach of such a duty, generally sued in an action of tort, though, as the law *implies* a contract to perform the duty, he may also be sued in an action of contract. See Mothoorakant *v.* I. G. S. Navigation Co., I. L. R., 10 Calc., 166, 186. When the *plaintiff* sues for a breach of *contract*, and proves his case, the three or six years' limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some *wrongful* act of *theirs* to which a *shorter* limitation would be applicable. (British I. S. N. Co. *v.* Hajee Mahomed, I. L. R., 3 Mad., 107; Dannull *v.* British I. S. N. Co., I. L. R., 12 Calc., 477). Plaintiff may *waive* the tort.

Waiving a tort.

[2] Austin, Vol. II, pp. 945, 946. See also Budrunnissa *v.* Muhommad Jan, I. L. R., 2 All., 671, 674; Rambox *v.* Modhoosoodun, 7 W. R., F. B., 377, 383. A *quasi*-contract denotes any incident by which one party

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far as the starting point of *limitation* is concerned, it does not appear that the Indian Legislature approves of this rule. Suits for contribution and suits for money had and received, which are founded in doctrines of equity, and which depend upon *quasi*-contracts, are provided for by arts. 99, 100, and 62 of Act XV of 1877. In *these* cases, at least, time is made to run from the date when the right arises—*i.e.*, from the occurrence of the incident which constitutes the *quasi*-contract, and not from the date when the obligor *refuses* to fulfil his obligation.[3]

Refusal, in *quasi*-contracts.

The defendant's *refusal* is the starting point of limitation in the following suits :—

Instances of defendant's *refusal* being the *punctum temporis*, or *terminus a quo*.

In a suit against Government for compensation for land when the acquisition is not completed, time runs from the date of the *refusal* to complete. (Art. 18, Sched. II, Act XV of 1877).

In a suit for the recovery of a wife, or for the restitution of conjugal rights, the period of limitation begins to run from the time when possession or restitution is demanded and *refused*. (Arts. 34 and 35).

In a suit against a factor for an account, or by a principal against his agent for moveable property received by the latter and not accounted for, limitation begins to run from the time when the account is, during the continuance of the agency, demanded and *refused*. (Arts. 88 and 89).

In a suit by a Mahomedan for exigible dower, the statute commences to run from the time when (during the continuance of the marriage) dower is demanded and *refused*. (Art. 103).

In a suit to establish a periodically recurring right, the *punctum temporis* is the time when the plaintiff is first *refused* the enjoyment of the right. (Art. 131). See also arts. 78 and 129.

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obtains an *advantage* which (in equity) he ought not to retain, or by reason of which he ought to indemnify the other. A *quasi*-delict denotes an incident by which *damage* is done to the obligee (though without intention or negligence, immediate or remote) and for which damage the obligor is bound to make satisfaction.

Quasi-contract and *quasi*-delict.

[3] In other cases of *quasi*-contracts not expressly provided for in the schedule, the rule laid down by Austin may be followed, but as English lawyers generally treat many cases of *quasi*-contracts as genuine implied contracts, it may be doubted if the Courts will adopt that rule in every case.

A suit for the recovery of money paid by the plaintiff by mistake, and *bonâ fide* received by the defendant, should be *preceded* by a demand. (Freeman *v.* Jeffries, L. R., 4 Exch., 199, 200 ; Student's Austin, 232). The date of demand, however, is *not* the date from which *limitation* runs in such cases in British India. See arts. 62 and 96, Act XV of 1877.

Money paid by mistake.

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It has been already observed, that neither in cases of contracts, nor of torts, does the plaintiff's *ignorance* of the occurrence of the breach or the tortious act affect the accrual of the cause of action or the starting point of limitation. The Indian Legislature departs from this rule in the following cases, in which the *punctum temporis* is fixed with reference to the plaintiff's *knowledge* of certain facts.

Cases where the plaintiff's *knowledge* determines the *punctum temporis*, or *terminus a quo*.

In a suit against a person who, having a right to use property for specific purposes, perverts it to other purposes, limitation runs from the time when the perversion first becomes *known* to the party injured. (Art. 32, Sched. II, Act XV of 1877).

In a suit for specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, the period begins to run from the time when the person having the right to the possession of the property first *learns* in whose possession it is. (Art. 48).

In suits by principals against agents for neglect or misconduct (not being suits for moveable property received by the latter and not accounted for), the statute runs from the time when the neglect or misconduct becomes *known* to the plaintiff. (Art. 90).

In suits to rescind a contract, or to cancel or set aside an instrument, or to declare the forgery of an instrument issued or registered, or for relief on the ground of fraud or mistake, plaintiff's *knowledge* materially affects the starting point of limitation. (See arts. 114, 91, 92, 95, 96).

In a suit for property which the plaintiff has conveyed while insane, limitation runs from the time when the plaintiff being restored to sanity has *knowledge* of the conveyance. (Art. 94).

In a suit for the specific performance of a contract, if there is no date fixed for the performance, time runs from the date when the plaintiff has *notice* that performance is refused. (Art. 113).

In a suit to obtain a declaration that an alleged adoption is invalid, or never in fact took place, the *punctum temporis* is the date when the alleged adoption becomes *known* to the plaintiff. (Art. 118).

In a suit by a person excluded from joint family property to enforce a right to share therein, the *terminus a quo* (the point from which the period commences to run) is the time when the exclusion becomes *known* to the plaintiff. (Art. 127).

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Under many circumstances, *means* of knowledge and *actual* knowledge may be very different things. But in no case is a man at liberty to shut his eyes to information within his reach, and so lengthen indefinitely the period of time within which he is to make his claim.[4]

Knowledge and means of knowledge.

There may be cases where the existence of the means of knowledge might lead irresistibly to the inference that the party had actual knowledge. Culpable and wilfully blind ignorance is equivalent to, or carries with it, the consequences of knowledge.[5] But the mere existence of some *means* of knowledge which if diligently prosecuted would lead to knowledge is *not necessarily* "knowledge" within the meaning of sec. 18 of the Indian Limitation Act.[5a]

It may be here observed that in the case of *suits* not governed by the *general* article, No. 120, of Sched. II, the time of limitation does not *necessarily* begin to run from the date of the accrual of the right to sue. Under the *express* provisions of the schedule, in some cases,[6] limitation runs from a time *after* the right to sue or apply has accrued, and in two other cases,[7] it runs from a time *before* the right to sue has accrued.

Date of accrual of right to sue, not always identical with the *terminus a quo*.

Under the *general* article, No. 178, *applications* not otherwise provided for, must be made within three years from the time when the *right to apply* accrues.

The other *terminus* of the period of limitation (the *terminus ad quem*) is the last day when the plaint (in an

Terminus ad quem.

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[4] Dhunput Sing *v.* Ruhoman, 9 W. R., 329 ; and 11 W. R., 163.

[5] Radhanath *v.* Gobind, 4 W. R., S. C. Ct. Ref., 19 ; Bibee Solomon *v.* Abdool, 8 C. L. R., 169, 184.

[5a] Where some clues and hints reached the plaintiff which, perhaps, if vigorously and acutely followed, might have led to a complete knowledge of the fraud, but where there was no disclosure made which informed the mind of the plaintiff that the fraud had been committed, specially where the defendant being in possession of books of account prevented the plaintiff from seeing the accounts which he desired to see, the onus of proving *knowledge* of the fraud is *not* discharged. (Rahimbhoy *v.* Turner, L. R., 20 I. A., p. 1). In any *particular* case, the Court, having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of attention being called to it, *may infer* such *knowledge* when the *means* of knowledge first come, or have for a reasonable time been, within the plaintiff's reach, or in other words *may hold* the plaintiff fixed with *constructive knowledge* of the fraud. (Nilmoni *v.* Nilu, I. L. R., 20 Calc., 425).

Means of knowledge may or may not amount to constructive *knowledge*.

[6] For instances, see art. 10 (suit to enforce a right of pre-emption) ; art. 85 (suit for a balance due on a mutual account) ; art. 101 (suit for a seaman's wages). See also art. 164 (*application* to set aside an *ex parte* judgment).

[7] See art. 145 (suits against depositaries and pawnees), and art. 138 (certain suits by execution-purchasers). See note 8, p. 223, *supra*.

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ordinary suit) may be presented to the proper officer of the Court.[s]

The periods of limitation are always prescribed by positive law. The periods prescribed are given in Sched. II, Act XV of 1877, the *general law* of limitation for British India.

Periods of limitation for suits.

Ten specified periods are made applicable to *suits*. These periods (varying from 30 days to 60 years) are as follows:—

30 days	... One	article	... Art.	1.
90 „	... One	„	... Art.	2.
6 months	... Three	articles	... Arts.	3—5.
1 year	... Twenty-four	„	... „	6—29.
2 years	... Seven	„	... „	30—36.
3 „	... Seventy-nine	„	... „	37—115.
6 „	... Five	„	... „	116—120.
12 „	... Twenty-four	„	... „	121—144.
30 „	... Two	„	... „	145 & 146.
60 „	... Three	„	... „	147—149.

Art. 120 the *most general* article. Six other *general* articles for suits.

Art. 36 is the *general* article for suits for compensation for *torts*. Art. 115 is the *general* article for suits for compensation for *breaches of contracts not registered*. Art. 116 is the *general* article for suits for compensation for breaches of *registered* contracts. Art. 49 is the *general* article for suits in respect of specific *moveable* property. Art. 80 is the general article for suits on *bills*, *notes*, and *bonds*. Art. 144 is the general article for suits for the *recovery* of *immoveable* property. Art. 120 is the *most general* article for suits. Where two articles or provisions are apparently applicable, the more *specific* provision must prevail. (*Ishen* v. *Jibun*, I. L. R., 16 Calc., 25, 29; and p. 196, *supra*).

Appeals.

Six several periods are specified as applicable to *appeals*. These periods (ranging from seven days to six months) are:—

7 days	... One article		... Art.	150.
20 „	... One	„	... „	151.
30 „	... Three articles		... Arts.	152—154.
60 „	... One article		... Art.	155.
90 „	... „	„	... „	156.
6 months	... „	„	... „	157.

[s] See sec. 4 of the Act. "The period of limitation ends on the day on which the plaint is duly lodged." (Morley's Digest, Vol. I, p. 245). In England the period ends on the date of the issuing of the writ of summons.

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Ten different periods are allowed for *applications*. These periods (varying from 10 days to 12 years) are as follows :—

10 days	... Two articles	... Arts.	158 and 159.
15 „	... „ „	... „	160 and 160A.
20 „	... One article	... Art.	162.
30 „	... Eight articles	... Arts.	163—170.
60 „	... Two „	... „	171 and 172.
90 „	... Three „	... „	173, 173A and 174.
6 months...	Six „	... „	175, 175A, 175B, 175C, 176, and 177.
3 years	... Two „	... „	178 and 179 (part).
6 „	... One article	... Art.	179 (part).
12 „	... „ „	... „	180.

The 28 sections of Act XV.

The first three sections of Act XV of 1877 relate to *preliminary* matters. Sections 4—25 (together with Sched. II) are concerned with the *limitation* of suits, appeals, and *certain* applications to Courts. Sections 26 and 27 provide rules for the acquisition of easements, including *profits à prendre*, by positive *prescription*.* And the last section (sec. 28) relates to the indirect acquisition of the ownership of corporeal property by *extinctive prescription*.

(The following remarks mainly refer to the *limitation of suits* and the barring of the *remedy*).

The operation of Act XV may be considered with reference to the circumstances of *time* and *place*, the *persons* to whom it is applicable, and the *subjects* (sorts of suits, appeals, and applications) to which its provisions wholly or partially apply.

Operation of the Act as to time, sec 2.

I. With regard to the circumstance of *time* it may be observed that the Act was passed (*i.e.*, received the assent of His Excellency the Governor-General) on the 19th July 1877, but did not come into force on that date. Its operation was postponed to the 1st October 1877, the day on which the Civil Procedure Code of 1877 came into force. The Act operates upon suits[10] instituted on

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* Secs. 26 and 27, and the definition of "easement" in sec. 3 do not apply to the Presidencies of Madras and Bombay, the Central Provinces, the N. W. Provinces, Oudh, and Coorg. See Acts V of 1882, and VIII of 1891.

[10] The Act applies also to appeals presented and applications made on or *after* that date. As to applications made after the 1st October 1877, in execution of decrees obtained in *suits instituted before* the 1st October 1877, see Becharam v. Abdul, I. L. R., 11 Calc., 55; Gurupadapa v. Virbhadrapa, I. L. R., 7 Bom., 459; and pp. 204, 213, and 214, *supra*.

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or after the said 1st day of October, save and except suits for which *longer* periods of limitation were allowed by Act IX of 1871. As to these exceptional suits (see arts. 59, 73, 118, 119, 127, 146, &c., of Act XV), the operation of the Act was further, *temporarily*, deferred. Titles *already acquired*, and causes of action *already barred*, are expressly saved from the operation of the new law. With these exceptions, the Act applies to transactions which took place before or after the 1st October 1877, and to causes of actions which accrued before or after that date.[1]

Operation, as to place, secs. 1, 6, and 11.

II. In respect to the circumstance of *place*, it may be remarked that the territorial operation of the Act extends to the *whole* of British India, *including* the Scheduled Districts as defined in Act XIV of 1874. In other words, it extends to the territories for the time being vested in Her Majesty by the statutes 21 and 22 Vict. c. 106 (an Act for the better government of India) other than the Settlement of Prince of Wales' Island, Singapore, and Malacca.[2]

It is expressly declared that the limitation laws of *Foreign States* shall have no application in the Courts of British India, even in respect of contracts entered into in such States, unless such laws have *extinguished* the contract, and the parties were domiciled there during the periods prescribed by such laws.[3]

As to *local* and special laws[4] in force or hereafter to be in force in British India, it is enacted that the *periods* of limitation specially prescribed by such laws shall not be altered or affected by the Act.[5] A local or special law, sometimes, *expressly* extends the *general provisions* of the Act to cases for which special *periods* are prescribed by such law. Thus sec. 23 of Act XVIII of 1881 (The Central

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[1] Sec. 2, Act XV, and Lecture VII, pp. 208 *et seq.* But it has been held by the Madras High Court that a regular suit, in respect of an order dated the 10th of August 1877, under sec. 269 of Act VIII of 1859, though instituted after the 1st of October 1877, was governed not by Act XV of 1877, but by the repealed limitation clause of sec. 269, Act VIII of 1859. The correctness of this ruling (Venkatachala *v.* Appathorai, I. L. R., 8 Mad., 134) may be questioned. See note, p. 242, *infra*.

New right of suit, in America.

It has been held in America that where a right to sue, not existing previously, is given by a new Act, in respect of a transaction which occurred before, limitation runs from the date when the Act giving the right comes into operation. Angell, sec. 61; Banning, 278.

[2] See Act I of 1868, and notes to sec. 3, in the Appendix.

[3] Sec. 11; and Lecture II, pp. 36 to 39, *supra*.

[4] Such as the Dekkhan Agriculturists' Act (XVII of 1879), Act XVIII of 1881, and Act VIII of 1885. See p. 219, *supra*.

[5] See sec. 6 and pp. 217 *et seq.*, *supra*.

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Provinces Land-revenue Act) enacts that, in *computing* certain periods of limitation prescribed by that Act, and in *all* respects not therein specified, the provisions of the Indian Limitation Act, 1877, shall apply. The Bengal Tenancy Act, VIII of 1885, sec. 185, enacts that secs. 7, 8, and 9 of Act XV of 1877 shall *not* apply to suits and applications mentioned in Sched. III of that Act, but that *all the other* provisions of Act XV shall apply to them and to appeals mentioned in the said Sched. III.

Operation, as to persons.

III. The persons affected by the Act. The Act applies to *all* persons who may sue or be sued in the Courts of British India, including the Government and the Secretary of State for India in Council. It applies to subjects as well as to aliens,* to juristical† as well as to natural persons, to Christians as well as to Hindus, Mahomedans, and others.

Operation, as to subjects.

IV. The *subjects* to which the operation of the Act extends.

Powers and liens.

A mortgagee's power of sale, or a widow's power to adopt a son, is not within the purview of the Act. There is no limitation to the *exercise* of such a *power*.‡ A *lien* or a right of *retainer* or *detention* of goods is not affected by the law of limitation, and exists notwithstanding that the debt is barred. (See p. 3, *supra*). A mortgagee who has sold the mortgaged property under his power of sale may *retain*, out of the proceeds, arrears of interest for *any number* of years, although his *suit* to *recover* the interest is barred by limitation.§

Property in possession of Court.

The statute of limitation does not debar a Court from declaring who is beneficially entitled to property which is in the possession of the Court itself.¶

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* As to suits by aliens, and by or against foreign and native rulers, see Chap. XXVIII of Act XIV of 1882. The time during which an alien enemy is prevented from suing is not excluded in his favor. There is one important difference in the application of sec. 7 of the Act to persons not domiciled in British India. A person *domiciled* in British India attains his majority according to the provisions of Act IX of 1875. But other persons are in this respect governed by the law of their own domicile. So far as the cessation of minority is a starting point of limitation, there is a difference in the application of the Act to these classes of persons.

† A corporation, a Hindu idol, &c., are juristical persons.

‡ Joychunder Roy *v.* Bhyrub Chunder Roy, decided by the Calcutta Sudder Court on the 18th December 1849. (Calcutta Sudder Dewany Rep., 1848, p. 461). See also Bamundoss *v.* Tarinee, 7 Moore's I. A., 169; and Mason *v.* Broadbent, cited in Banning, p. 278.

§ Marshfield *v.* Hutchings, 34 Ch. D., 721. See also Dhanjibhai *v.* Navazbai, I. L. R., 2 Bom., 75, 83.

¶ Dixon *v.* Gayfere, 23 L. J. Ch., 60; and p. 171, *supra*.

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Pendency of suit.

The Limitation Act does *not* limit the *pendency* of a proceeding which has been already commenced.[10]

Preamble, secs. 1, 6, and 10.

The Act governs the institution of all *suits*, not being suits under the Indian Divorce Act (IV of 1869), or suits relating to certain hereditary offices in the Revenue and Police Departments, under Madras Regulation VI of 1831. The Act further applies to all appeals and applications to Courts, specified in the second and third divisions of Sched. II, and to other applications *eiusdem generis* with the applications so specified. Applications for certificates under Acts XXVII of 1860 and XL of 1858, and applications for probate or letters of administration,—not having any connection with any *suit* pending or already decided,—are not governed by the provisions of Act XV of 1877.[1]

Act does not apply to *all* applications.

Further, the Act does not apply to applications which the Court has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character, nor to applications asking the Court to pass judgment, or to do what it is bound to do under the law.[2]

Again, suits against express trustees, or their representatives (not being assigns for valuable consideration) for the purpose of *recovering the trust-property for the trusts in question*, are exempted from the operation of the Act.[3] In order to bring the case within this exception, the trusts must be shown to have been created for some definite or

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Pendency of suit.

[10] Even sec. 230 of Act XIV of 1882 does *not* limit the *pendency* of an execution proceeding. Such a proceeding as well as a suit or an appeal may be *pending* for any length of time. The *pendency* of a *suit* may in one case be limited by sec. 99A of Act XIV of 1882. Thus where a summons on the defendant is returned unserved, and the plaintiff fails to apply for fresh summons for a period of *one year* from the date of the nazir's countersignature below the bailiff's endorsement of non-service, the suit may be dismissed. (Parsotam *v.* Abdul, I. L. R., 13 Bom., 500).

[1] *In re* Ishan Chunder Roy, I. L. R., 6 Calc., 707; 8 C. L. R., 52; Janaki *v.* Kisavalu, I. L. R., 8 Mad., 207. Art. 178 was not intended to apply to an application under the Religious Endowments Act, an application for the appointment of new trustees, &c. Janaki *v.* Kisavalu, I. L. R., 8 Mad., 207. See notes to art. 178, Sched. II, Act XV of 1877. Act XXVII of 1860 is now replaced by Act VII of 1889, and Act XL of 1858 by Act VIII of 1890.

[2] Kylasa *v.* Ramasami, I. L. R., 4 Mad., 172; Vithal *v.* Vithojirov, I. L. R., 6 Bom., 586; Ishwar Dass *v.* Dosibai, I. L. R., 7 Bom., 322. An application to revive a suit (in which a decree had been made and a reference ordered) and to restore it to the reference list from which it had been struck off, is not governed by art. 178. (Govind Chunder *v.* Rungonmoney, I. L. R., 6 Calc., 60). An application to transfer a pending case from one board to another or to transfer it to the bottom of the board is not governed by art. 178, Act XV. (*Ibid.*)

[3] Sec. 10; Balwant Raw *v.* Puran Mal, 13 C. L. R., 39, P. C.; I. L. R., 6 All., 1.

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particular purpose or object as distinguished from trusts of a general nature, such as the law impresses upon executors and others who hold recognized fiduciary positions.[4]

General provisions of Act applied to local and special Acts.

Lastly, the provisions of the Act do not affect or alter the *periods* specially prescribed for any suits by special[5] or local laws. It has been held in a number of cases, that the *general provisions and exceptions* relating to the computation of the periods of limitation do apply even to such suits.[6] The provisions of the *general* Law of Limitation (Act XV of 1877) may, as far as possible, be considered to have been incorporated with the limitation clause of any section of the *general* Code of Civil Procedure. See pp. 216, 217, *supra*, and *Phoolbas Koer* v. *Lalla Jogeshur*, 25 W. R., 285, P. C.) Even the provisions of sec. 7, Act XV of 1877, which are *strictly* applicable only to suits and applications *mentioned* in Schedule II of the Act, have been *practically* extended by the Bombay High Court to applications under sec. 230 of the Code of Civil Procedure. (See *Moro* v. *Visaji*, I. L. R., 16 Bom., 536).

It has been already observed that, although Act XV of 1877 is called The "Indian *Limitation* Act, 1877," it deals with certain portions of the law of acquisitive and extinctive *prescription*. (See secs. 26—28).

Rules and exceptions enacted by Act XV.

Having briefly reviewed the *operation* of Act XV in respect of time, place, persons, and subjects, we shall next consider the rules and exceptions (as to the limitation of suits) enacted by that law.

First rule, explanation and proviso, secs. 4 and 22.

First general rule. Subject to the exceptions and provisoes mentioned below, *every suit instituted after the prescribed period of limitation shall be dismissed, although limitation has not been set up as a defence.*[7]

By a *subsidiary* rule it is explained that an ordinary suit is instituted when the plaint is presented to the proper officer of the Court; and a suit in *formâ pauperis*, when the application for leave to sue as a pauper is filed.[8] And

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[4] Gireender *v.* Mackintosh, I. L. R., 4 Calc., 897.

[5] Such as the Law of Landlord and Tenant, the Registration Act, &c., &c. See sec. 6, Act XV of 1877.

[6] See the latter end of Lecture VII. The same remark applies to appeals and applications under special or local laws.

[7] Sec. 4. See Lecture IV, pp. 81 *et seq*.

The first general rule applies to suits, appeals, and applications. But para. 2 of sec. 5 allows *appeals*, and applications for *reviews*, to be admitted even *after* the prescribed period for any sufficient cause of delay.

[8] See explanation to sec. 4, which further provides that in the case of a claim against a company which is being wound up by the Court, the suit is deemed to be instituted when the claimant first sends in his

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it is *provided* that when after the institution of a suit a *new* plaintiff or defendant is substituted or added, the suit shall, as regards the new plaintiff or defendant, be deemed to have been instituted when he was so made a party.[9]

Second rule, complement, and proviso.

Sec. 25, Act I of 1868, and art. 85, Sched. II.

Second general rule. As the complement of the rule enacted elsewhere,[10] that the words "year" and "month" in the *Act*, respectively, mean a year and month reckoned according to the British calendar (which, since the 2nd September 1752, is the same as the Gregorian calendar), it is enacted by sec. 25 that *all "instruments" shall, for purposes of limitation, be deemed to be made with reference to the Gregorian calendar.*

So that "year" and "month" in the Act, as well as in contracts, wills, and other instruments bearing native or non-English dates, shall be construed in the sense which they bear in the English calendar. When, for instance, the date of a contract and the date when it is to be performed are dates of the Bengal or Fussily year, the corresponding dates of the English year should be taken, and the period of limitation calculated from such English dates according to the Gregorian calendar.[1] As to how the length of a year or a month is computed, see pp. 206 and 207, *supra*.

Provided that, in a suit for the balance due on a mutual, open, and current account (where the period of limitation runs from the close of the "year" in which the last item admitted or proved is entered in the account) if any era *other* than the English era is used in the said account, the "year" is to be computed as in the account.[2]

Third rule, sec. 12.

Third general rule. Inasmuch as fractions of a day are not recognised (except where it becomes essential for the purposes of justice to ascertain the exact hour or minute), the day of the accrual of the cause of action must be either

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claim to the official liquidator. As to applications for leave to sue as a pauper being registered as a plaint, see sec. 410, Act XIV of 1882. The *re-institution* of a suit under the provisions of sec. 20, Act XIV of 1882, is the *institution* of the suit within the meaning of the first Rule.

[9] Sec. 22. See the notes under sec. 22, in the Appendix. The legal representative of a deceased plaintiff or defendant, when the suit as instituted is *continued* by or against such representative, is not a new plaintiff or defendant within the meaning of this proviso.

[10] See the General Clauses Act, 1868. The second rule, also, applies to appeals and applications as well as to suits.

[1] Nilkanth *v.* Dattatraya, I. L. R., 4 Bom., 103; Almas Bance *v.* Mahomed Ruja, 6 C. L. R., 553; I. L. R., 6 Calc., 239.

[2] Art. 85, Sched II. See also Maharajah Jay Mungal *v.* Lal Rung Pall, 4 B. L. R., App., 53; 13 W. R., 183.

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included or excluded in its *entirety*.[3] The Act adopts the latter alternative, and lays down that, *in computing the prescribed period of limitation, the day from which such period is to be reckoned shall be excluded*.[4] Third rule.

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[3] *De minimis non curat lex.* The law does not take heed of trivial matters. For the *exception*, see Angell, Chap. VI; Pugh *v.* Robinson, 1 T. R., 116; Subbay *v.* Yellamma, I. L. R., 9 Mad., 130, at p. 132; Banning, p. 254. Trivial matters.

In the *legal* computation of a calendar month or year, time is *not* computed *de momento in momento*. The hours and minutes are trifles, about which the law does not concern itself.

In Lester *v.* Garland (15 Ves., 248) it was held that an act required to be done *within six months after the testator's death*, which took place on the 12th of January, would be done in proper time if done on the 12th of July next. The Master of the Rolls, at p. 257, says:

"Upon technical reasoning it would be more easy to maintain that the *day* of an act done, or an event happening, ought in *all* cases to be *excluded*, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of *indivisible point*; so that any act done in the compass of it, is no more referable to any one than to any other portion of it; but the act and the day are co-extensive, and therefore the act cannot properly be said to be passed until the day is passed." The *day* of the testator's death is the *time* of his death, and that time must be passed before the six months begin to run. "There seems to be no alternative but either to take the actual *instant*, or the *entire day*, as the *time* of his death." If the whole of the day in which the death occurred were computed as one of the days *subsequent to* the death, we should be throwing back the event into a day on which it did not happen. "To *include* the day of the occurrence is to begin the computation from the preceding day." As to the mode of computing months and years, see the judgment of Denman, J., in Migotti *v.* Colvill, 4 L. R. C. P. Div., 233, and p. 207, note (3), *supra*. First day excluded.

[4] Sec. 12, para. 1.

But in *computing* the *age* of a person, the day of his birth is *included* as a whole day. (Act IX of 1875, sec. 4; 1 Jarman on Wills, 45). As to *when* a person attains majority according to the Indian law, and *when* according to the English law, see Lecture IX, *infra*. First day included.

In *excluding* the time of the continuance of an injunction or order by which the institution of a suit has been stayed, the *first* day, *viz.*, days, both the day of the order (as well as the *last* day), *is included*. (Sec. 15). First and last included.

A computation *from* the day of the date of a particular act or event *excludes* the day. (Angell, sec. 53, note; Act I of 1868). The words "within six months *after* the testator's death" *exclude* the day of the death. (Lester *v.* Garland, 15 Ves., 248). In the expression "so many days *after* date" the day is *excluded*. (Angell, sec. 49). "*By* a certain day" means *before* that day—the day it seems is excluded. (Angell, sec. 52). "Ten days, *at least*" or "ten *clear* days" would mean ten *whole* days, over and above the day on which the cause arose, and the day on which the proceedings are commenced. (Banning, 256; Angell, sec. 53, note). In law an "instant" is not a *point* of time. *Instanter* means 24 hours. (Angell, sec. 53). See pp. 206 and 207, *supra*. *From*, *after* or *by* a day. Both days excluded.

The third rule, like the first and second, applies to appeals and applications as well as to suits. The third general rule refers to the *first*

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Fourth rule, sec. 9.

Fourth general rule. *When once the period of limitation has commenced to run in any case, it will not cease to do so by reason of any subsequent disability or inability*[s] *to sue (although such disability or inability may be within the saving of the Act).* (*Sec. 9*).

Sec. 9 explained and illustrated.

The minority, insanity or idiocy of the plaintiff will not stop the running of time, if the event from which limitation starts occurred while he or the person through whom he claims was under no such disability. The non-existence of a legal representative, entitled to sue or liable to be sued, would be no bar to the operation of limitation, if *at the time when the right to sue accrued* there was a person in existence capable of instituting the suit, and another against whom the suit might have been instituted.[s] Inability to sue by reason of plaintiff's want of funds, or absence in a foreign country, or by reason of the Courts being closed during the *beginning* of the period of limitation, is not a ground of exemption or extension recognised by the Act. And as no equitable construction can be put upon the Act, such inability, *though existing at the time of the accrual of the right to sue*, does not prevent the operation of limitation. And the same remark applies to the

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day of the period of limitation, and the first general exception (sec. 5) to the *last* day of that period.

Disability and Inability.

[s] Disability is want of a legal qualification to act. Inability is want of a physical power to act. Inability to sue, by reason of the Court being closed on the *last day* of the period of limitation (sec. 5), does *not stop* the running of time. It *extends* the period of limitation until the Court reopens. Inability to sue, in cases where the commencement of the suit has been stayed by injunction (sec. 15), does *not* also *stop the running of time*. It entitles the plaintiff in the computation of the period of limitation to an *exclusion* of the time during which the commencement of the suit was stayed. In both these cases of subsequent inability the operation of limitation is *practically* suspended, and the running of time *practically* stopped. But these are not cases of "inability to sue" within the meaning of sec. 9. The expression "inability to sue" does not occur in any section of the Act except sec. 9.

[s] The *express language* of secs. 7 and 17 renders it necessary that the *disability* and *inability to sue* mentioned in those sections must exist at the time when limitation (ordinarily) commences to run. So far as these sections are concerned, the rule in sec. 9 is therefore unnecessary. As observed by Sir James Colvile, in the Statement of Objects and Reasons appended to his Limitation Bill of 1855, the English and American rule that when the Law of Limitation has once begun to run, nothing shall stop it, "seems to depend more on the *language* of the statutes than on any sound principle." But the framers of the Acts of 1871 and 1877 emphasize the rule by giving it an independent force.

Fourth rule when of use.

The rule will probably operate in cases of concealed fraud under sec. 18. If a fraud is practised on the person entitled to sue, and limitation commences to run, it will not cease to run by reason of any subsequent fraud against his successor.

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non-existence of the actual plaintiff, at the time when the period of limitation *commenced* to run against some *other* person in existence, and then entitled to bring the suit, as in the case of a suit to set aside an adoption (under art. 129 of Act IX of 1871) instituted by a sister's son of the adoptive father, where the sister's son was born after the adoption.[7]

Non-existence of the plaintiff.

According to Birdwood, J., the *inability* referred to in sec. 9 is a personal inability affecting the *plaintiff himself*, and having reference to *his* condition or state or position, and *not* to the circumstances of the *person against whom* he is entitled to institute a suit. The *defendant's* absence from British India is not a case of "inability to sue" within the meaning of sec. 9. (*Hanmantram* v. *A. Bowles*, I. L. R., 8 Bom., 561, 570). Sec. 17, sec. 18 and the proviso to sec. 9 give instances of "inability to sue" in which an extension of time is allowed to the plaintiff.

Inability to sue.

The first part of sec. 9 is not an enabling enactment. It does not say that any disability or inability to sue existing at the time when the cause of action accrues *shall entitle* the plaintiff to an extension of time, but only that any *subsequent* disability or inability *shall not entitle* him to such an indulgence.

Subsequent disability or inability.

The Indian Legislature does *not* (as some text-book writers do)[8] lay down that no subsequent *event* shall stop the running of time, but simply that no subsequent *disability* or *inability to sue* shall have that effect.

A defendant not residing within the limits of British India may (in many cases at least) be easily sued in the Courts of British India. The defendant's *absence* from British India is not a "disability" within the meaning of secs. 7 and 9, and is not an "inability to sue" within the

Defendant's absence.

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[7] See Siddheshur Dutt v. Sham Chand, 23 W. R., 285. The altered language of art. 118, Act XV of 1877, removes this difficulty.

[8] Banning on Limitation, pp. 6, 227, 234, 253. Chief Justice Hornblower, in an American case, says, that where the Statute of Limitation has commenced running, "it runs over all subsequent disabilities and intermediate acts and events." See Angell, sec. 477, note. Mr. Banning (see pp. 6, 226, 234, and 253 of his work on limitation) mentions three exceptions to this rule: (1) where a debtor is the administrator of his creditor; (2) where an abated suit is (after the expiration of the statutory period) revived against the representative of a deceased defendant; (3) where the Crown is assignee of an unbarred debt. The first exception is recognized by the proviso to sec. 9. The subject of the second exception is dealt with by the express provision of art. 175C. (See Act VII of 1888). The third exception will probably be recognised by our Courts. See notes to art. 149, in the Appendix.

Three direct exceptions to continuous running of time.

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Effect of acknowledgments and payments.

purview of the latter section.[9] Nor are the terms applicable to written *acknowledgments*, and *payments* made by the defendant or his agent. In the case of an acknowledgment or payment, the time already running is *stopped* by the operation of *law* consequent upon the giving of the acknowledgment or the making of the payment. The running of time in such a case is *not* stopped by any subsequent *disability*, or *inability* to sue.[9a] Nevertheless, in these and other cases,[10] the running of time is *practically*

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[9] See Beake & Co. *v.* Davis, I. L. R., 4 All., 530, and Hanmantram *v.* A. Bowles, I. L. R., 8 Bom., 561, where the ruling in the case of Narranji *v.* Mugniram (I. L. R., 6 Bom., 103) was dissented from, and it was held that the time of defendant's absence from British India, whether *subsequent* to the accrual of the cause of action *or not*, is to be excluded in favor of the plaintiff under sec. 13 of the Act. It may be observed that the rule was exactly the same under Act XIV of 1859 (see Thompson, 2nd Ed., p. 284), and is the same under sec. 27 of the New York Revised Statutes, Vol. II, Part III, Ch. 4, Tit. 2, from which the Indian Legislature has borrowed the provisions of sec. 15 of the Act. See Angell, Appendix LXIII. In the case of subsequent absence (according to the theory of the Act) time *runs* as usual, but the period of absence is not *deemed* a portion of the time prescribed by the law.

Subsequent absence.

[9a] Venkata *v.* Kothanda, I. L. R., 13 Mad., 135, at p. 138.

Prevention, suspension, and interruption of the operation of limitation explained and illustrated.

[10] The rule as to the continuance of the running of time being dependent on the continuance in force of the enactment under which time has been running, if before the prescribed period has expired, the statutory pressure be removed by the total repeal of the Act, the operation of limitation is *stopped* unless the Legislature re-enact the old law. If a *new* rule of limitation be enacted and come into operation before the action is barred by the old law, the running of time may be *affected* by the new rule. (See Abdul Karim *v.* Manji, I. L. R., 1 Bom., 295, 303, and Mudhavar *v.* Achuda, I. L. R., 1 Mad., 301). But compare Venkatachala *v.* Appathorai (I. L. R., 8 Mad., 134), in which it was held that the repeal (of the limitation clause) of sec. 269, Act VIII of 1889, on the 1st of October 1877, did not deprive an order passed under that section of the effect it possessed when passed. It was held that an order under that section, passed some seven weeks before the repeal, became final if it was not set aside by a suit within one year (the period prescribed by sec. 269), although the new law of limitation did *not* re-enact the old law.

Repeal of the law.

There are several cases of *virtual suspension* of limitation (for five of these cases, see secs. 13 to 16, and the Table. For cases of *interruption*, see secs. 19, 20, 21, and 23, and the Table). Under Act XIV of 1859 it was held that estoppels *in pais* and compromises in some cases had the effect of suspending or preventing the operation of limitation. (See pp. 80, 87). Where a debt is made payable by instalments, with a proviso that, on default of payment of any one instalment, the whole debt, or so much of it as may then remain unpaid, shall become due, limitation runs from the time of the first default. But if the plaintiff *waives* the benefit of the proviso by a subsequent act, such waiver practically *interrupts* the running of time. (See art. 75, Act XV; Cheni Bas *v.* Kadum, I. L. R., 5 Calc., 97). Articles 179 and 180, relating to the execution of decrees, offer other instances in which the running of time is practically interrupted by an application, a notice, revivor, &c., &c. Suspension or interruption

Estoppels.

Waiver of default.

Revivors.

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suspended or *interrupted* by an *event* which occurs *subsequently* to the accrual of the right to sue. The only case in which, according to the language of the Act, a *subsequent disability* or *inability* to sue *suspends the running of time* is a case where there is "the same hand to give and receive." The proviso to sec. 9 is as follows: *Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.*

(Proviso. Sec. 9. "Same hand to give and receive)."

Here the Act *expressly* says that the running of time shall be *suspended* by a specified subsequent event. But there are five other events mentioned in Part III (see secs. 13,

Proviso to the 4th rule explained.

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occasioned by the repeal of old laws, and interruption caused by waiver or by applications, &c., in execution, are not referred to in the Table.

Limitation is *suspended* when certain durations of time are allowed to be deducted in the computation of the period. In cases *of suspension* the period which has already elapsed is not invalidated, but is added to the period which follows the suspension. Limitation is *interrupted* when a fresh period is allowed after it has run for some time. In cases of *interruption*, the already elapsed portion of the period of limitation is cancelled, and a fresh period of limitation is computed from the date of interruption. See Poste, Gaius, p. 585.

Suspension.

Interruption.

According to the *language* of Act XV of 1877 in the case of the legal disability of the plaintiff, limitation *does not (begin to) run* against him. In the case of the administration of a creditor's estate by his debtor, the *running of time is suspended* by the administration. In the case of defendant's absence, and some other cases mentioned in secs. 14, 15, and 16, the plaintiff is entitled to the *exclusion of certain periods in the computation* of the time of limitation,—that is such periods are not *deemed* to be any portions of the prescribed time. (In these cases, the running of time is *virtually* 'suspended'). In the case of "death *before* the right to sue accrues," or of concealed fraud, the period of limitation is to be *computed from a later date* than the date of the actual cause of action. The running of time is here *prevented* by the operation of limitation being postponed to the date of the statutable cause of action. In the case of an acknowledgment or payment, *a new period of limitation is to be computed* from the date of such acknowledgment or payment. *Practically*, previous death and concealed fraud "prevent the running of time," and acknowledgments and payments "interrupt the running of time." But in all the excepted cases, save those of legal disability, and debtor's administration of the creditor's estate (secs. 7, 8, and 9), according to the theory and language of the Act, limitation *runs* as usual, though under the express provisions of the Act, the period of limitation is extended, by the operation of limitation being *practically* 'suspended,' as shown above, or 'prevented' by the introduction of a statutable cause of action, or 'interrupted' by the renewal of the period of limitation. Cessation of legal disability (under secs. 7 and 8) is a statutable cause of action like that provided for by sec. 17 or sec. 18, but it is only in cases under secs. 7 and 8 that, in the *language* of the Act, *time does not run* from the ordinary starting point, as it is only in cases under the proviso to sec. 9 that the *running of time is suspended* by a subsequent event.

Time, *not running.*

Running *suspended.*

Exclusion in the computation.

Computation from a *later date.*

New period computed.

Practical effect of the exceptions.

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Five cases of *virtual* suspension.

14, 15, and 16, and the Table appended to this Lecture) which *virtually* suspend the operation of limitation, cause a break in the period, and give the plaintiff an *extended* time. These five cases are not referred to in the proviso, either because they are not cases of disability or inability to sue *within the meaning* of the rule in sec. 9, or because they are treated as cases in which limitation, theoretically, continues to run, though certain periods during which it so runs are not *deemed* to be any portions of the prescribed time of limitation. For obvious reasons, suspension, which may be caused by a *total repeal* of the Act, is also not mentioned.

Debtor becoming *administrator.*

The proviso to sec. 9 refers to the case of a debtor obtaining letters of *administration* to his *creditor's estate*, either before or after limitation has commenced to run.[1] Cases where a debtor becomes the *executor* of his creditor, and a *creditor or legatee* becomes the executor or administrator of his *debtor's or testator's estate*, are not mentioned.

Remedy *suspended.*

The grant of letters of administration, being an act of law, and not of the parties, operates as a *suspension* of the remedy. But where a creditor appoints his debtor an executor, and the executorship is accepted, this being a voluntary act of the parties, the debt is, according to the theory of the English Common law, *extinguished* on the supposition of its being paid by the executor to himself, and thus becoming assets in his hands for which he is accountable.[2] This is probably the reason why the proviso does not extend to the case of the debtor becoming *executor*

Executorship *extinguishes* debt at *law.*

"Same hand to give and receive."

[1] See Seagram *v.* Knight, L. R., 2 Ch. App., 632. Where "the hand to give and receive" is virtually the same, a *constructive payment* is sometimes presumed. See Topham *v.* Booth, 25 Ch. D., 607.

[2] Brown, p. 468; Banning, 226, 227; Williams on Executors, Part III.

In Ingle *v.* Richards, 28 Beav., 366, it was held that, although a debtor, being one of several executors of his creditor's will, did not prove the will till his debt was already barred by limitation, yet the debt was revived by his subsequently proving the will, inasmuch as that proof related back to the testator's death, and he was ordered to account for the sum owing with interest. In a more recent case, it has been held that the appointment of a debtor of the testator as one of his executors, *releases* the debt *at law*, even if he does *not* prove the will. (Leveson *v.* Beales, 1891, 3 Ch., 422). But whatever may be the common *law* on the subject, *in equity, and therefore in substance*, the debt remains exactly as it would do if a stranger be appointed executor of the creditor's will. (Turner *v.* Cox, Moore's Privy Council Cases, Vol. VIII, P. 288, at p. 315). The claim in equity, however, may be rebutted by the evidence of facts shewing an *intention* on the part of the testator in his lifetime, to *forgive* the debt. (Leveson *v.* Beales). In Akerman *v.* Akerman (1891, 3 Ch., 212) it has been held that *legatees* of aliquot shares of the general residue of a testator's estate must, before they claim such shares, pay their debts to the testator, if such payments go

In equity the claim exists, but may be rebutted.

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to his creditor. In the *converse* case of a *creditor or legatee* becoming the executor or administrator of the debtor or testator, the creditor or legatee may pay himself out of the assets which he has to administer. He is not obliged to bring any suit for the purpose of making *himself* pay the debt or legacy.[3]

Creditor becoming executor or administrator.

The fourth rule applies to suits as well as to applications.[4]

Two other rules (relating to the starting point of limitation in certain cases) are given in secs. 23 and 24.

Fifth rule. *Where there has been a continuing*[5] *breach of contract or a continuing wrong (independent of contract) a new period of limitation begins to run at every moment of the time during which the breach or the wrong continues. (Sec. 23).*

Fifth rule. Sec. 23, and arts. 19, 23, 42, 115, and 116.

It is, however, provided by arts. 115 and 116, Sched. II, that, in a suit for *compensation*, in the case of a continuing breach of *contract*, the time when the breach *ceases* is the time when the period of limitation begins to run. Articles 19, 23, and 42 in the same way provide that, in certain cases of continuing *wrong*, limitation runs from the time when the wrong *ceases*. So far as the bar of limitation is concerned, there is *practically* this difference between these provisions and the rule in sec. 23, that, according to the

Continuing breaches or wrongs.

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to increase the general mass of the residue, although such debts were barred by limitation at the date of his death. This ruling does not affect a *specific* legacy, or the debt due by a *specific* legatee. Such a legacy, so long as it takes effect, cannot form a part of the *residue*. The legatee of the whole or a share of the *residue* is paid by holding in his own hand a part of the fund (*viz.*, the debt due by him to the estate) which goes to make up the residue. The executor has a right to pay such a legatee out of the fund in his own hand. (*In re* Akerman. Akerman *v.* Akerman, 1891, 3 Ch., 212). Similarly, it has been held that an *administrator* can set off a statute-barred debt against a share of an intestate's estate. None of the *next of kin* of the intestate can take any share of the estate until he has discharged his obligation to it, and paid his debt in full. (*In re* Cordwell's estate, L. R., 20 Eq., 644).

Legatee of residue, or next of kin must pay their debts though barred, before taking residue or share.

Section 87 of the Indian Trusts Act, No. II of 1882 (which does not extend to Bengal and Bombay), enacts as follows: "Where a debtor becomes the executor or other legal representative (*i.e.*, administrator, &c.) of his creditor, he must hold the debt for the benefit of the persons interested therein." The debtor becomes *a trustee* for the creditor.

The Indian Trusts Act.

[3] See Binns *v.* Nichols, L. R., 2 Eq., 256; and Banning, p. 226. "Where the person liable for the payment of a legacy, and the person entitled to receive it, are the same, no question of limitation under the Statute can arise." (L. R., 2 Eq., 256). See note 1, *supra*.

[4] The term "to sue" is not defined in the Act. "Inability to sue" includes "inability to apply." See Shumbhoo Nath *v.* Guru Churn, 6 C. L. R., 437; I. L. R., 5 Calc., 894.

[5] See pp. 222, 225, *supra*, for an explanation of this term.

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language of these articles, the defendant, in a suit for compensation for false imprisonment (art. 19), or for the other wrongs or breaches (arts. 23, 42, 115, and 116), cannot divide the time of the continuance, and plead limitation to so much of the wrong or breach as took place more than the prescribed number of years from the time of the institution of this suit.[6] But in cases of continuing breaches and wrongs, not covered by these special provisions, such a course may be open to the defendant.[6a]

Sixth rule. Sec. 24. Where *damage* is *essence* of action.

Sixth rule. *In the case of a suit for compensation for an act which is not actionable in itself, without some (special damage or) specific injury caused thereby, the period of limitation shall be computed from the time when the (damage or) injury is caused.* (*Sec. 24*).

In cases governed by this rule, damage is of the *essence of the action*. There is no *ground of action* without some specific damage or injury.[6b]

Article 25 expressly enacts that, in a suit for slander, if the words are not *per se* actionable, the period of limitation runs from the time when the special *damage complained of* results. This express provision would seem to be unnecessary (in view of the rule laid down in sec. 24), except (*perhaps*) where more than one specific injury is caused by the slander, and the plaintiff complains of the later injury.[7] The two *successive* injuries are treated as two *distinct* wrongs. The 4th rule treats of *continuing* wrongs. But the 5th rule treats of wrongs which, though *not continuing*, are wrongs in respect of which successive suits may be instituted as often as specific injury actually results from the act complained of.[7a]

Successive and *continuing* wrongs.

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[6] In a case of false imprisonment, he may do so in England (see 12 East, 67; and Darby and Bosanquet, p. 30), and under sec. 23 he might do so in British India, if the provisions of that section were not controlled by art. 19.

[6a] In these *other* cases of continuing wrong, the plaintiff may sue for *damage* accruing *within* the period of limitation. If no damage has occurred within the period, the suit must fail. (Dwarka v. The Corporation of Calcutta, I. L. R., 18 Calc., 91, at p. 98).

Arts. 34 and 35 relate to continuing wrongs, but *not* to suits for *compensation* for such wrongs. Arts. 37, 38, and 39 relate to suits for *compensation* for what may be continuing wrongs. In these suits, under arts. 37-39, the defendant may *divide* the time of the continuance of wrong, and plead limitation as stated in the text.

[6b] See p. 225, *supra*.

[7] The plaintiff may be in time from the date when the special damage *complained of* results, though out of time from the date of the earlier injury or damage. See pp. 225, 226, *supra*.

[7a] Successive subsidences causing damage are *successive* and *distinct* wrongs in respect of which successive suits may be brought under sec. 24 of the Act, independently of any provision analogous to the latter portion of art. 25. (See pp. 225, 226, *supra*).

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The fifth and sixth rules may be treated as *provisoes* or *exceptions* to the ordinary rule, that limitation commences to run from the date of the act or omission complained of, and they have been so treated in the Table at the end of this Lecture.

Exceptions to the application of the periods of limitation.

In this Lecture, we have already noticed all the sections* of Parts I, II, and III, except sec. 3 (which is an interpretation clause) and the sections which relate to exceptions† founded on special grounds, such as the closing of the Courts on the last day of the period of limitation, the legal disability of the plaintiff, the absence of the defendant from British India, *bonâ fide* proceeding in a wrong Court, temporary injunction staying the commencement of suit, death before right to sue accrues, concealed fraud, acknowledgments, and payments. The appended Table gives a general view of these as well as other exceptions.

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* Secs, 1, 2, 6, 10, and 11 relate to the *operation* of Act XV of 1877.

Secs. 23 and 24 and Sched. II, col. 3, relate to the *starting point* of limitation.

Sched. II, col. 2, relates to the *periods* of limitation.

Secs. 4, 22, 25, 12, 9 (and secs. 23 and 24 also) relate to general *rules*. Sec. 3 relates to interpretation.

The other sections (of Parts II and III), *viz.*, secs. 5, 7, and 8, proviso to sec. 9, and secs. 13—21, relate to general *exceptions*.

† These are exceptions to the two most important general rules, *viz.*, the first and the fourth.

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LECTURE IX.

THE EXCEPTIONS, LEGAL DISABILITY.

Important exceptions, secs. 5, 7, 13, 14, 18, 19, 20—Reasons for these exceptions—Legal disability of plaintiff—Minority—The Majority Act—The previous state of the Law of minority and majority—Foreign Laws—Insanity and idiocy—Co-existing and successive disabilities—Subsequent birth or adoption of claimant—Disability of defendants no ground of exemption—Sec. 7, Act XV, applies to Suits and Applications—Disability at the time from which the period of limitation is to be reckoned—Inconvenience of this rule—Arts. 44 and 94—Cessation of disability or death under disability, a statutable cause of action—Proceedings during the period of disability—Disability confers a *personal* privilege—Assignees not entitled to the privilege—Hard cases under the existing law—. To whom is cessation of disability, or death under disability, a cause of action—The Law allows the maximum period of three years from the statutable cause of action, or the full period from the ordinary starting point of limitation—No fixed limit to the indefinite extension of time under sec. 7—An exception to the exception—Disability of one of several joint claimants.

Seven important exceptions. Secs. 5, 7, 13, 14, 18, 19, and 20.

Of the exceptional circumstances which directly extend the period of limitation, or which indirectly do so[1] by preventing, suspending or interrupting the running of time, the following seven[2] may be considered the most important:

1. The fact that the *Court is closed* (whether on authorized holidays or on working days)[3] during the *latter end*

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[1] Where the existence of the exceptional circumstance does *not* give the plaintiff a *longer* time, the section relating to the exception is not applied. Thus, if plaintiff is dispossessed of a taluk when he is 13 years old, and he attains his majority five years after, he may sue to recover the taluk within 12 years from the date of his dispossession (*i.e.*, until he is 25 years old), and section 7 of Act XV of 1877, which gives him only three years from the time of attaining his majority, will not be applied. The plaintiff need not avail himself of the provisions of that section, and the defendant cannot compel him to do so. (Kaleedoss *v.* Behari, 2 W. R., 305; Radhamohun *v.* Mobesh, 7 W. R., 4). The same remark applies to the cases referred to in Illustrations (*e*) and (*f*) appended to section 7. Similarly, payment of interest on money lent, when the principal is not yet due, will not prevent the creditor from suing within the ordinary period reckoned from the due date. It is *only* in cases like these that the ordinary period prescribed by the Act is *not extended* by the existence of the exceptional circumstance. For the meaning of the terms *prevention*, *suspension*, and *interruption* of limitation, see pp. 242, 243, *supra*.

The exception as to express *trustees*, is a *total* exemption from the operation of limitation, and is therefore not referred to here.

[2] Five of these (*viz.*, 2 to 6) were the only general exceptions which, with certain restrictions, were recognised by Act XIV of 1859.

[3] Bishen *v.* Ahmed, I. L. R., 1 All., 263. The old law and the cases thereon are referred to in a note at p. 265, *ibid.*

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of the prescribed period of limitation. Here the period is *directly extended* to the day when the Court reopens. Section 5.

Seven important *exceptions.*

2 The legal *disability* (minority, insanity, or idiocy) of the plaintiff. Here the operation of limitation is *prevented* by the continued existence of the disability. Sections 7 and 8.

3. *Absence of the defendant* from British India. Here the operation of limitation is practically *suspended* so long as the defendant is absent. Section 13.

4. Abortive *bonâ fide proceeding* by the plaintiff against the defendant in a Court which has no jurisdiction or authority to entertain it. Here also the operation of limitation is practically *suspended* so long as the proceeding continues. Section 14.

5. *Fraudulent concealment* by defendant of plaintiff's right to sue, &c. Here the operation of limitation is *prevented* by the fraud, and postponed to the discovery of the fraud. Section 18.

6. Written *acknowledgment* of liability signed by the defendant or his agent. Here the operation of limitation is *interrupted* by the acknowledgment, and a *new* period of time commences to run *again* from the date of the acknowledgment. Sections 19 and 21.

7. *Payments of interest* or *part payments* by the defendant or his agent. Here also the payment *interrupts* limitation, and gives the plaintiff a *new* period. (See secs. 20 and 21). Sections 19 and 20 and Exceptions 6 and 7 speak of a *new period* of limitation—not an *extension* of the *old period*. (*Venkata* v. *Kothanda*, I. L. R., 13 Mad., 135, at p. 137).

Exception (1) applies to the limitation of suits, appeals, and applications.

Exceptions (2), (4), (5), (6), and perhaps[4] (7) apply to the limitation of suits as well as of applications. Exception (3) applies to the limitation of suits only.[5]

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[4] See Ramhit *v.* Satgar, I. L. R., 3 All., 247, where the correctness of the ruling in Kally Prosonno *v.* Heeralall, I. L. R., 2 Calc., 468, on the corresponding section of Act IX of 1871, was doubted by Stuart, C. J., who was inclined to hold that part payments of *judgment-debts* after decree would give a fresh start as regards *applications* for execution. See also Janki *v.* Ghulam, I. L. R., 5 All., 201, and Lecture XI. Judgment-debts.

[5] In all these paragraphs, save that relating to defendant's *absence*, 'plaintiff' includes 'applicant' and 'defendant' includes 'the party *opposed* to the applicant.' In the exception relating to the Court being closed, 'plaintiff' includes 'appellant' also.

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Reasons for these exceptions.

The first of these grounds of exception is based on an act which proceeds from *neither of the parties* to the case, and which occurs at a time to which a recourse to law is very often deferred, namely, the latter *end* of the period of limitation.

The second exception is founded on the *involuntary disability of the plaintiff* (the party who has to initiate the proceedings) at the time when limitation ordinarily *commences* to run.

The third ground of exception is based on the absence from British India of the *defendant* (the party to be sued), whether such absence is *voluntary or involuntary*, and whether it occurs in the beginning[6] or *any* other part of the period of limitation.

The fourth, fifth, sixth, and seventh grounds of exception are based on certain *voluntary acts* of one of the *parties*;—the fourth, on acts of the *plaintiff*, positively showing his diligence; the fifth, on acts of the *defendant*, which prevent the plaintiff from proceeding against him; and the sixth and seventh, on positive acts of the *defendant*, which remove the obliterating effects of the time that has already elapsed, by showing, directly or indirectly, that his liability still exists.

In these and other cases, the time of limitation is virtually enlarged, because, under the circumstances, the plaintiff is not considered guilty of *laches* in not enforcing his right within the specified period, or because the conduct of the defendant renders it unnecessary to exact the penalty attached to the lapse of time.

The positive *law* itself—not its *reason*—should be considered.

But as the maxim *cessante ratione legis, cessat et ipsa lex* (the reason of the law ceasing, the law also ceases), and arguments founded on analogy, are inapplicable[7] to *positive enactments* of the Legislature, too much stress should not be laid on the *reason* of the law. The exceptions recognised by the Legislature are founded on its own ideas of expediency, that is, on what it considers expedient upon the balance of convenience and inconvenience. The Judge and the lawyer, arguing *analogically* from the *reason* of the law, cannot engraft a *new* exception upon the rule, or refuse to apply an exception to a case which is within the *plain* meaning of the *words* in which it has been enacted

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[6] Narainjee *v.* Mugniram, I. L. R., 6 Bom., 103, in which it was ruled that the *subsequent* absence of the defendant is no ground of extension, has been dissented from in Beake *v.* Davis, I. L. R., 4 All., 530, and Hanmantram *v.* A. Bowles, I. L. R., 8 Bom., 561. See Lecture VIII, p. 242.

[7] See Lecture VII, pp. 184, 196, *supra*.

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These seven exceptions (together with others mentioned in the Table) will be considered again in the notes under the several sections of the Act. In this and the following two lectures, we shall confine our attention to the three exceptions in respect of legal disability, acknowledgments, and payments.

Legal disability of plaintiff.

Under Act XIV of 1859, the following persons were deemed to be under legal disability: Married women *in cases governed by English law*, minors, idiots, and lunatics. Coverture was not deemed a legal disability under the Regulations, nor is it deemed such under the later Acts of 1871 and 1877. Before the recent changes in the law, the identity of interests between husband and wife was considered sufficient to secure attention to her claims against third parties.[a] And where the interests of the *feme covert* were in opposition to the claims of the husband, she might have sued by her next friend.

Only three grounds of disability.

The minority, insanity, idiocy of the plaintiff are the *only* grounds of legal disability that are now recognised by the law of Limitation in British India. The disability of alien enemies under sec. 430 of the Civil Procedure Code is not a disability within the meaning of the exception in sec. 7, Act XV of 1877. The existence of a dispute as to the plaintiff's title, and the pendency of a suit respecting it, do not constitute a legal disability or a ground of exemption.[b] *Doubt* as to the plaintiff's right, or difficulty in asserting it, does not affect the running of the statute, and is not a legal disability.[ba] Nor is *plaintiff's* absence from British India, or his imprisonment or transportation, a disability under sec. 7.

Minority.

In Act IX of 1871 "minor" meant a person who had not completed his age of eighteen years. Act XV of 1877 omits this definition, because a definition is (in the generality of cases) supplied by the Indian Majority Act, IX of 1875. In a question of minority or majority arising upon the issue of limitation under Act IX of 1871, there was no

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[a] See Reports of the Indian Law Commissioners for 1843-1844. But in 1859, the Legislature was of opinion that such married women, like minors, required *special* protection. The English statutes which have *freed* married women from disability have not been extended to British India. Section 4 of the Indian Succession Act lays down the *general* law of this country as to the *capacity* of persons married after the 31st December 1865. Such married women, whether domiciled in England or in India, can now sue in India without joining their husbands. (Hughes *v.* Delhi and London Bank, I. L. R., 15 Calc., 35).

English women married after 1865.

[b] Mudden Mohun *v.* Nund Kishore, 5 W. R., 295. See also Rajah Saheb Perhlad *v.* Moharajah Rajendro, 12 W. R., P. C., 6, 18, 21: Sankaran *v.* Periasami, I. L. R., 13 Mad., 467, 469.

[ba] Buswell, paragraph 104, note.

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distinction between persons of different races or nationality, or between persons domiciled in British India and persons who were not so domiciled.[10] But now, the question, when a foreigner not domiciled in British India attains his majority, is left undetermined[1] by Act XV of 1877 or Act IX of 1875.

The Majority Act.

The Indian Majority Act, which came into force on the 3rd June 1875, enacted the two following rules[2]:—

Rule (a).

(a). Every minor, of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall be deemed to have attained his majority when he shall have *completed* his age of *twenty-one* years, and *not before*.

A guardian *ad litem* is not a guardian within the meaning of this rule.[3] A testamentary guardian, though he takes out probate from the Court, is *not appointed* by the *Court*.[4] The guardian must be actually appointed[5] under

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[10] Rainey *v.* Nobocoomar, 5 C. L. R., 543, F. B.

Personal law and law of domicile, as to non-age.

[1] The *capacity* to contract is regulated by the law of *domicile*. (Per Lord Halsbury in Cooper *v.* Cooper, 13 App. Cas., 99). The law which determines a person's *majority* or *minority* is the law of his *domicile*. (Per Lord Westbury in Udny *v.* Udny, 1 Sc. Ap., 457). In the absence of a definition in Act XIV of 1859, the term "minor" was construed according to the *personal* law of the party in each case. (Hari *v.* Vasudev, 2 Bom., 325). Mr. Justice Markby in Rollo *v.* Smith (1 B. L. R. O. C., 10) held that a legitimate descendant of a European British subject, born in Calcutta, was as regards the status of majority governed by the English Common Law. European British subjects in the Presidency Towns, as well as in the Mofussil, were held to be minors until they attained the age of 21 years. (Hearsey *v.* Girdharee, 3 N. W. P., 338). In a suit under Act IX of 1871, and not affected by Act IX of 1875, European British subjects with an Indian domicile were, as regards the question of limitation, held to attain majority at the completion of the 18th year as provided in Act IX of 1871. (Rainey *v.* Nobocoomar, 5 C. L R., 543, F. B.) After the passing of Acts IX of 1875 and XV of 1877, it has been held that European British subjects, *if not domiciled in British India*, are as regards their capacity to sue or to enter into contracts, governed by the common law of England. (Rohilkhand and Kumaon Bank *v.* Row, I. L. R., 7 All., 490, F. B.)

[2] Section 3, Act IX of 1875.

[3] Section 443, Civil Procedure Code. This overrides Suttya *v.* Suttyanund, I. L. R., 1 Calc., 388.

[4] Jogesh Chunder *v.* Umatara, 2 C. L. R., 577.

Order for, and actual *issue* of, Certificate.

[5] It was held in several cases that a mere *order* granting a certificate was not sufficient; the certificate must be actually *issued* by the Court (Stephen *v.* Stephen, I. L. R., 9 Calc., 901; Sahai Nund *v.* Mungniram, I. L. R., 12 Calc., 542; Nowbat *v.* Lala Kedar, I. L. R., 13 Calc., 219). *Contra*, Chunee Mull *v.* Brojonath, I. L. R., 8 Calc., 967; Girish *v.* Abdul, I. L. R., 14 Calc., 55. Their Lordships of the Privy Council have overruled the cases first mentioned and held that when the Court *adjudges* the applicant to be entitled to a certificate

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Act XL of 1858 or Act XX of 1864 (or by a similar proceeding), or the Court of Wards must actually assume the management* of the minor's estate, *before* he completes his eighteenth year. Otherwise, rule (*b*) applies.

(*b*). Every *other* person (whether a native or a foreigner) *domiciled* in British India shall be deemed to have attained his majority when he shall have *compeleted* his age of *eighteen* years, and *not before*. The language of rule (*b*) is not modified by Act VIII of 1890. But rule (*a*) as *amended* by sec. 52 of Act VIII of 1890 now runs as follows: Rule (*b*).

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he *substantially obtains* it, although it may *not* be *drawn up* or *issued* at the time. (Mungniram *v.* Gursahi, I. L. R., 17 Calc., 347). Under the Guardians and Wards Act, VIII of 1890, it is now *not at all necessary* to take out a *certificate* of administration or pay any *fee* for it. (See section 2). The *appointment or declaration* by the Court before the minor attains the age of eighteen years, raises the age of majority to 21 years. (See Girish *v.* Abdul, I. L. R., 14 Calc., 55, Yeknath *v.* Waruba, I. L. R., 13 Bom., 276, and section 52, Act VIII of 1890). The new Act also adopts the ruling in Periyasami *v.* Seshadri, I. L. R., 3 Mad., 11, and lays down that the age of majority is 21 years if the *superintendence* of the minor's property is *assumed* by any Court of Wards before he attains the age of 18 years. Effect of P. C. ruling and Act VIII of 1890.

Where there was no evidence that a guardian of the person or property of the defendant had ever been appointed within the meaning of sec. 3 of the Indian Majority Act, IX of 1875, and where the defendant had ceased to be *under the jurisdiction of* the Court of Wards *at the time* of the execution of the promissory notes, it was held, he was then, though only nineteen, not a minor, but *sui juris* and competent to enter into a binding contract. The Collector is not a Court of Justice within the meaning of sec. 3 of the Majority Act. A manager or guardian appointed by the *Collector* under sec. 12 of Act XL of 1858 is not a guardian appointed by a *Court of Justice*. A Collector appointed by the Judge, under section 12 of Act XL of 1858, to take *charge* of the minor's estate cannot properly be styled the *guardian* of a minor's property: under sec. 3 of the Majority Act (as it was originally passed), the disability of minority continues only so long as the minor continues under the jurisdiction of the Court of Wards, that is, so long as the Court *retains* charge of a minor's property, and no longer. Rudra Prokash Misser *v.* Bhola Nath Mukherjee, I. L. R., 12 Calc., 612, referred to and commented on. (Birjmohun Lall *v.* Rudra Prokash Misser, I. L. R., 17 Calc., 944).

But sec. 52, Act VIII of 1890, has now modified the law. When any Court of Wards has once assumed superintendence of the minor's property before the minor has attained the age of 18 years, the disability of infancy will last till the age of 21, whether the Court of Wards continues to act or not. So, even under the old law, when a guardian had been once appointed or declared by any *Court of Justice* before the minor had attained the age of 18 years, the disability would last till the age of 21, whether the original guardian continued to act or not. (See Rudra *v.* Bhola, I. L. R., 12 Calc., 612).

Even before Stephen *v.* Stephen had been overruled by the Privy Council, it was held that a mere *order* appointing a guardian of the *person* was *sufficient*. (Yeknath *v.* Waruba, I. L. R., 13 Bom., 285).

* Periyasami *v.* Seshadri, I. L. R., 3 Mad., 11.

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Rule (a) as modified by Act VIII of 1890.

Every minor of whose person or property, *or both*, a guardian *other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure*, has been or shall be appointed *or declared* by any Court of Justice *before the minor has attained the age of eighteen years*, and every minor of whose *property the superintendence* has been or shall be *assumed* by any Court of Wards before the minor has attained that age shall be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before.

So far as the capacity to sue[7] is concerned, a minor attains majority under rule (*a*), at the beginning of the 21st anniversary of his birthday, and under rule (*b*), at the beginning of the 18th anniversary of that day.[8]

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[7] Section 2, Act IX of 1875, enacts a *proviso*, so far as the capacity to *act* in certain *non-judicial* matters is concerned. (See Puyikuth *v.* Kairshirapokil, I. L. R., 3 Mad., 248).

Age of majority how computed.

[8] Section 4, Act IX of 1875. In computing the age of any person, the day on which he was born is to be *included as a whole day*. (Section 4, Act IX of 1875). If *A* was born at 11 P.M. on the 1st of January 1870, he attained majority at the first moment (*i.e.*, even before 1 A.M.) of the 1st of January 1888,—if his case fell within rule (*b*). He *completed* his age of 18 years at 12 P.M. of the 31st December 1887 and was a minor *before* the *end* of that day. If rule (*a*) be applicable to the case, *A* will attain majority at the first moment of the 1st day of January 1891. For the English law on this subject, see Herbert *v.* Torball, 1 Sid., 162 ; Grant *v.* Grant, 4 Y. & C., 256. According to the English law a person born on the 1st of January attains majority at the first instant of the 31st of December, that is, at the first instant of the day on which he becomes 21 years old. Jarman on Wills, Vol. I, p. 45.

British subjects in Native States.

It may be mentioned here that Act IX of 1875 extends to the whole of British India, and so far as regards *subjects* of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty. The Act was passed with the object of prolonging the period of nonage and of attaining greater uniformity and certainty respecting the age of majority.

The previous state of the law of minority and majority.

The previous state of the law was anything but satisfactory. Mahomedans attained their majority at the age of sixteen unless symptoms of puberty appeared at an earlier age. (Abdool *v.* Musst. Elias, 8 W. R., 301, but see Agra Sud. Rep. for 1857, p. 21). Hindus, according to the Bengal school, attained majority at the end of fifteen years, and according to the Mitakshara school, on the completion of the sixteenth year. (Calc. Sud. Dewany Reports for 1853, p. 505 ; 2 Bom., 325). In the mofussil, sec. 2, Beng. Reg. XXVI of 1793, extended the period of minority of *proprietors of estates paying revenue to Government* to the end of the 18th year, whether they were Hindus or Mahomedans, males or females, in possession or out of possession, in respect of all acts done by such proprietors, both as to matters connected with real estate and matters of personal contract. (Bykunt *v.* Pogose, 5 W. R., 2 ; Ranee Roshun *v.* Rajah Enayet, 5 W. R., 4). Act XL of 1858 similarly extended the period in the case of *all* persons in the mofussil of the Bengal Presidency, not being European British subjects, whether certificates had been taken out under the Act or not. (Modhu-

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Foreign laws as to the age of majority.

"Twenty-one is the full age by the laws of England, Spain, and of the United States of America, and also by the law which now prevails in France, Belgium, and Holland; but in the three countries last mentioned, a minor is emancipated and obtains majority at once by marriage; or, if he has completed his fifteenth year, by a judicial declaration of the father, or, if the father be dead, of the mother."[9]

Insanity and idiocy.

The term "lunacy" (see sec. 12, Act XIV of 1859) has acquired an extent of meaning equal to that of the generic term "insanity," though it was formerly used to denote *periodical* insanity only.[10]

An idiot is a person who, by a perpetual infirmity from his birth, has been without understanding. A man who is deaf and dumb from his birth is not necessarily an idiot, though this may be the legal presumption. Insanity is not congenital, it is caused by sickness, grief, or other accident.

Insanity or unsoundness of mind is a ground of exemption, whether there has been a commission of lunacy, or committeeship, or any analogous measure or not.[1] Under Acts XXXIV and XXXV of 1858, a person is a lunatic when he is incapable of managing his affairs by reason of unsoundness of mind.[2] And "unsound mind" comprehends imbecility, whether congenital or arising from old age, as well

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sudun *v.* Debe Govinda, 10 W. R., F. B., 36, but cf. Damoder *v.* Wilayet, I. L. R., 7 All., 763). A different construction was put upon the corresponding Bombay Act (XX of 1864), and it was held that the limit of 18 years was not applicable to any person until the Act was brought into play by the exercise of the jurisdiction of the Court. (Shivji *v.* Datu, 12 Bom., 281). Hindus and Mahomedans and others, domiciled in Calcutta and subject to the jurisdiction of the Supreme Court or the Original Side of the High Court, were not affected by Reg. XXVI of 1793 or Act XL of 1858. (Mothoor Mohun *v.* Coomar Surendro, 24 W. R., 464, F. B.; Kally Churn *v.* Bhuggobutty Churn, 19 W. R., 210, F. B.) But in Rajcoomar Roy *v.* Alfuruddin, 8 C. L. R., 419, in which the Full Bench decision in the 24 W. R. was not referred to, it was held by a single Judge that if a resident of Calcutta had property in the mofussil the age of his majority might be extended by the provisions of Act XL of 1858, at least, if the cause of action occurred, and the suit was brought, in the mofussil.

[9] Macpherson's Civil Procedure Code, 5th Ed., p. 67.

[10] Webster.

[1] Troup *v.* E. I. Co.; Dyce Sombre *v.* E. I. Co., 4 W. R., P. C., 111. A *permanent* incapacity of mind (not arising from illness of a *temporary* character) rendering a person incapable of attending to business or managing his own affairs, amounts to *unsoundness* of mind, though his state of mind is not such that he would be found a *lunatic on inquisition*. (*In re* Martin's Trust, 34 Ch. D., 618). But a lunatic is not obliged to sue by his next friend unless he is *adjudged* to be so. Sec. 463, Civil Procedure Code. Oomasundari *v.* Ramji, 9 C. L. R., 13.

[2] Mr. G. Sherman *v.* E. Sherman, 24 W. R., 124.

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as mental alienation resulting from disease.[3] A temporary loss of memory and understanding arising from accidental and temporary causes, or mere weakness of intellect, does not constitute insanity or unsoundness of mind.[4]

Partial insanity.

It has been *said* that if the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, such a mind is not really sound on other subjects.[5] But it has been *held* that the mere existence of *a delusion* in the mind of a person making a disposition or contract is not sufficient to avoid it. It is only where the delusion has *affected* the particular disposition or contract, that it can have such effect.[5a]

Lucid interval to be clearly proved.

In the case of lunacy, the ordinary presumption is, that those who are thus unfortunately visited never entirely recover their mental faculties. Where the fact of lunacy is proved generally, a lucid interval is not presumed, but the sanity and legal competency of the party must be clearly proved.[6] A mere diminution or remission of the

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[3] Brown, p. 549.

[4] *In re* Cowasji, I. L. R., 7 Bom., 15.

Ballantine's view of partial insanity based on Waring v. Waring.

According to Serjeant Ballantine, if the dicta of the Judges in MacNaughten's case (on which sec. 84 of the Indian Penal Code appears to be based) are to be received as law, then a totally *different* principle governs *civil* and *criminal* cases, and a person *incapable* of making a *will* or executing a *deed* may, nevertheless, be liable to be executed for the commission of what in a *sane* person would be a *crime*. A *civil* act is destroyed by proof that the person performing it was at the time subject to mental delusion upon *one* subject although in every other perfectly reasonable. The mind is one and entire, and if diseased, it is impossible, whatever may be the external signs, to say to what extent, and in what direction, the disease extends. But according to the Judges in MacNaughten's case, although a person may in a *particular* matter act under an insane delusion, and act in consequence thereof, he is equally liable with a person of sane mind, *unless* it be *shown* that the delusion destroyed his *knowledge of the difference between right and wrong*. (Serjeant Ballantine's experiences, Chapter XX, pp. 165, 167). But on the question of the *civil* liability of persons who are partially insane, there has been, since 1870, a change in the opinion of Judges and lawyers. See note 5, *infra*.

Change of opinion.

[5] See Waring *v.* Waring, 6 M. P. C. C., 341. The position assumed in Waring *v.* Waring is that the mind is one and indivisible. But whatever may be the essence of our mental constitution, the faculties and functions of the mind are various and distinct, and it has been held by Cockburn, C. J., Blackburn, Mellor, and Hannen, JJ., that *partial* unsoundness not affecting the general faculties, and not operating on the mind of the testator or grantor in regard to the devise or grant is not sufficient to invalidate the will or the grant. (Banks *v.* Goodfellow, L. R., 5 Q. B., 550, at p. 556 *et seq.*)

[5a] Banks *v.* Goodfellow (1870), L. R., 5 Q. B., 550; Jenkins *v.* Morris (1880), 14 Ch. D., 674; Murfelt *v.* Smith (1887), 12 P. D., 116.

[6] Waring *v.* Waring, 6 Moo. P. C. C., 341, 357; Hall *v.* Warren, 9 Vesey, 611.

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complaint is not sufficient.[7] So far as I know, it has not been decided in any reported case that the occurrence of a lucid interval shall be deemed to be a cessation of disability within the meaning of the Exception in sec. 7. It has been held in America that limitation begins to run against an insane person upon his *recovery*, and is not interrupted by a *recurrence* of the insanity.[7a] But the occurrence of a lucid interval, in the sense of a mere remission of the disease, can by no means be treated as a *recovery* from insanity.[7b]

Is a lucid interval a cessation of disability?

Act XIV of 1859 did not expressly provide for double or co-existing disabilities. Act IX of 1871 supplied this defect, but did not provide for supervenient or successive disabilities in the same or different persons.[8] Act XV of 1877 not only extends the time when the plaintiff is under two disabilities, at the time when limitation ordinarily commences to run, but it grants the same privilege, if a second disability supervenes before the cessation of the first. And it does the same,[9] if the person to whom the right to sue first accrued dies before he ceases to be under a disability, and his legal representative labours under the same or another disability. Thus, if *A*, the party first entitled to sue, is a minor at the time when the period of limitation begins to run, and insanity supervenes before he attains majority, or if *A* dies a minor, leaving an infant or an insane person as his legal representative, limitation does not commence to run either against *A* in the first case, or his representative in the second, so long as he or his

Co-existing and successive disabilities.

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[7] Angell, sec. 197 (note), where selections from D'Augnesseau, and Sir Wm. Grant's decision in Hall *v.* Warren, 9 Ves., 611, are referred to. In recent times it has been found that the moral and intellectual qualities are hardly ever entirely effaced, and that insane persons are susceptible of very much the same kind of influences as other persons. This discovery has opened a new and difficult enquiry as to the legal *liability* of insane persons. (Markby, 3rd Ed., secs. 724, 725). This, however, does not affect the *exemption* granted by sec. 7 of Act XV of 1877.

[7a] Clark *v.* Traill, Buswell, paragraph 108.

[7b] Properly speaking a lucid interval is a "temporary *cure*" of the disease—an intermission, and not a mere remission of the disease. (Wharton). It is an interval in which the mind having thrown off the disease has recovered its general habit. (Per Lord Thurlow, in Attorney-General *v.* Paruther, 3 Bro. C. C., 234). But there is no law which requires a lucid interval to continue for any particular length of time, whether an hour, a day, or a month. It should, however, be of sufficient length to do an intended rational act. (Cartwright *v.* Cartwright, 1 Phillim., 90, 100).

What is a lucid interval.

[8] Sookhmoyee *v.* Raghubendro, 24 W. R., 7; Rajah Lall *v.* Delputti, 5 C. L. R., 374, 392.

[9] Successive disability in different persons, that is, the disability of representatives, is no ground of extension under 3 and 4 Will. IV, c. 27. See sec. 18.

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representative is not entirely free from disability; provided, of course, that the disabilities overlap each other, and there is no break between them. If it is not a case of a *continuing* disability from the first, if *A* ceases to be under any disability (even for a day) before he dies, or if his legal representative is not a minor, or insane, or an idiot, *at the time* when he dies, limitation commences to run, and no *subsequent* disability of *A* or his legal representative stops it.[10] Such subsequent disability occurring at *any* time during the ordinary period of limitation, was a ground of extension under the Regulations.[1] But since the Limitation Act of 1859, the law of British India[2] follows the English rule, that time does *not* run against the person entitled to sue, *only* if he is under a disability from the very day when the right to sue accrues, or when limitation ordinarily begins to operate.

Subsequent birth or adoption of claimant.

If limitation commences to run against the party who is, at the time, the person entitled to bring the action, even the subsequent birth[3] of a preferable claimant will not give the latter any extension of time on the ground of *his* minority or idiocy.

In case of *alienation* by Hindu female.

The subsequent birth of a person, who would be the next owner after the death of a Hindu female, in case an alienation or an adoption made by her be set aside, does not entitle that person, although he is under a disability, to take advantage of the exception allowed by the law. Thus, where a Hindu of Bengal dies leaving behind him his mother, a sister, and an uncle's son, and the mother alienates the estate left by him, limitation under art. 125 of Act XV commences to run against the uncle's son; and a son of the sister, born after the alienation, cannot, in a suit to *set aside the alienation*, claim an extension of time on the ground of his (subsequent) disability, although such disability has existed from the time of his birth. The sister's son, however, will be entitled to bring a suit for *possession* after the death of the mother under art. 141. The same rule applies to the case of an improper alienation by a Hindu widow, which

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[10] Sreemutty Obhoya *v.* Hurrikristo, 10 W. R., 285.

[1] Dyce Sombre *v.* E. I. Co., 4 W. R, P. C., 111; Amrita *v.* Rojoni, 23 W. R., 214. The operation of limitation was suspended. The period of minority was deducted in the computation. See p. 45, note, *supra*.

[2] See Lecture VIII, p. 240, and Lecture III, p. 51.

[3] The person who claims the benefit of this exception must be in existence at the time when limitation usually begins to run. (Siddhessur *v.* Sham Chand, 23 W. R., 285; Mrinno Moyee *v.* Bhoobun Moyee, 23 W. R., 42, 44). A Hindu widow was dispossessed of her husband's estate in 1849. She adopted a son in 1851, and the son attained his majority in 1865. In 1866 the adopted son instituted a suit for recovery of the estate. Held, that the suit was barred by limitation. Govind *v.* Anando, 2 B. L. R., 313.

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a son subsequently adopted by her attempts to set aside during the *life* of the widow.[4] Again, where the mother and guardian of a Hindu infant son is *dispossessed* of the family estate, and the infant dying unmarried, the mother succeeds him as his heir, and then legally adopts a minor son, limitation begins to operate against the mother from the death of the first minor, and the second minor cannot claim the benefit of the exception, although he has been under a disability from the time of his adoption into the family.[5] In the case of a family, similarly circumstanced, if the mother or other guardian improperly *alienates* the estate instead of being dispossessed of it, limitation, it is apprehended, commences to run against the mother from the time when she succeeds the first minor as his heir, and the subsequent adoption of the second minor, and the consequent divestment of her interest, does not stop the running of time. But it has been said that, in such a case, the adopted son occupies the same position as the first ward for whom the guardian acted at the time of the alienation, and that a suit to set aside the alienation is not barred if brought within three years of the second ward's attaining his majority.[6] This dictum is based on the supposition that the principle of art. 44 of Act XV applies to the case, that the cause of action does not arise, and that time does *not commence* to run until the adopted son attains his majority. The alienation, however, not being made by the mother *as the guardian of the second minor*, the suit, *strictly* speaking, is not a suit by a ward "to set aside a sale by *his* guardian" within the meaning of art. 44.

In case of *dispossession* of Hindu female.

Alienation by Hindu female as mother and *guardian*.

It is only when the person *entitled to sue* is under a disability that the law extends the prescribed period of limitation. When the *defendant*, or the party *liable* to be sued, is under a legal disability, no extension is allowed, for there is nothing to prevent the plaintiff from suing such a party. The *absence* of the defendant from British India, though not a legal *disability*, often makes it difficult for the plaintiff to prosecute a suit against him, and such absence is recognised

Disability of *defendants* no ground of exemption.

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[4] Gobind *v.* Ramkanye, 24 W. R., 183.

[5] Gobind *v.* Hurro Chunder, 7 W. R., 134. Adverse possession against a Hindu widow or mother is adverse to a son subsequently adopted by her. Time begins to run from the date of the dispossession, and not from the date of the subsequent adoption. The suit of the adopted son claiming the estate of the last male owner is barred if the adoptive mother was dispossessed more than 12 years before the suit. (Krishnaji *v.* Morbhat, I. L. R., 13 Bom., 276).

[6] See Prosonno *v.* Afzolonissa, I. L. R., 4 Calc., 523. But compare Sookh Moyee *v.* Raghubendro, 24 W. R., 7. Mr. Starling also doubts the correctness of the first ruling. See his notes to art. 44.

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as a ground for extending the ordinary period, by sec. 13, Act XV of 1877.

Sec. 7, Act XV, applies to suits and applications.

Under Acts XIV of 1859 and IX of 1871, the legal disability of the plaintiff was a ground of exemption from the ordinary rule in respect of the limitation of *suits* or *actions*. And it was held in several cases, that the legal disability of an applicant to make an *application* (*e.g.*, of a decree-holder to make an application for the execution of the decree) was not a ground for extending the prescribed period of limitation.[7]

According to the practice of the Calcutta Sudder Court, decree-holders in their applications for execution were allowed the benefit of the exceptions to the ordinary law.[8] The framers of Act XV have adopted the doctrine of the Sudder Court, and *expressly* extended the exception as to disabilities and several other exceptions to all *applications* to which its provisions apply.[9]

The time for preferring an *appeal* is not extended by the circumstance of the appellant being under a disability.[10]

Disability at the time from which the period of limitation is to be *reckoned*.

Under Act XIV of 1859 and Act IX of 1871, it was necessary that the person entitled to sue should be under a disability at the time when the *right to sue* first accrued. Under the present law it is necessary that the disability should exist at the time from which the period of limitation is to be *reckoned*. It has been already observed[1] that this time (*viz.*, the *terminus a quo*) is not necessarily identical with the date of the accrual of the right to sue. Where the starting point of limitation, as fixed by the 3rd column of Schedule II, Act XV of 1877, is *later* than the accrual of the cause of action, no inconvenience will arise by this change in the law. But in cases where, under the express

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[7] Rotty *v.* Chunder, 5 W. R., Misc., 10; Tarruck *v.* Poorno, 8 W. R., 137; Muthoora *v.* Shambhoo, 20 W. R., 53; Dhonessur *v.* Roy Gooder, I. L. R., 2 Calc., 336, F. B. *But* see Jugmohun *v.* Luchmeshur, I. L. R., 10 Calc., 748, where it has been held, on the authority of the ruling in Hurochunder *v.* Shoorodhonee, 9 W. R., 402, F. B., that the word "suit" in Act XIV of 1859 included execution proceedings, and that a minor decree-holder under that Act was entitled to apply for execution within three years after attaining his majority.

"Suit" includes *application*.

[8] See Hyder Alí's case, decided on the 11th January 1851.

[9] See Anantharama *v.* Karuppanan, I. L. R., 4 Mad., 119; Monmohun *v.* Gunga, I. L. R., 9 Calc., 181; Jugmohun *v.* Luchmeshur, I. L. R., 10 Calc., 748; Bhikaji *v.* Purshotam, I. L. R., 10 Bom., 220.

Review, and leave to appeal.

[10] Sheikh Khoda Bux *v.* Budri Narain, 8 C. L. R., 306, 309; I. L. R., 7 Calc., 137. An application for *review*, or for *leave to appeal*, being an *application* is governed by sec. 7, Act XV of 1877. See Dabee Dutt *v.* Subodra, 25 W. R., 449; *In re* Sitaram, I. L. R., 15 All., 14, 17.

[1] See Lecture VIII, p. 231, *supra*.

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provisions of Schedule II, limitation starts from a time *anterior* to the date when the plaintiff is first *entitled* to sue, he may not, if he falls into disability in the *interval*, have *any* opportunity of asserting his rights.[2] Section 7 of Act XV will not apply to his case, because he was not under any disability at the time from which the period of limitation is to be *reckoned*, though he fell into disability at the time when his *right* to sue first accrued. Thus if a person pawns moveable property with an understanding that he will redeem the same after one year from the date of the pawn, he may, under art. 145, have *no* opportunity of suing the pawnee, if he becomes *insane* in the course of the year, and is not cured until more than 30 years *after* the date of the pawn. So, again, in a suit by a purchaser of land at a sale in execution of a decree, for possession of the purchased land (when the judgment-debtor was in possession at the date of sale), the plaintiff will have no extension of time, if he becomes *insane* after the date of the sale, (from which the period of limitation is to be computed), although such insanity overtakes him *before* the sale is *confirmed* under section 316 of the Civil Procedure Code. Until Act XII of 1879 was passed, the title to the property vested in the purchaser from the date of sale, but now it vests from the date of the certificate and confirmation of sale, so far as the decree-holder and the judgment-debtor and persons claiming through or under them are concerned. If a suit for possession, therefore, has to be instituted against persons claiming through or under the judgment-debtor, the purchaser may, under art. 138, have *no* opportunity of asserting his rights, if he becomes insane *after* the *sale*, but *before* its *confirmation*, and is not restored to sanity until more than 12 years have elapsed from the date of sale.

Inconvenience of this new provision, where insanity occurs *before* the accrual of *right*, but *after* the actual starting point of limitation.

Even where time has begun to run against a minor plaintiff's father and therefore against plaintiff, he is entitled to the benefit of sec. 7, if by reason of defendant's acknowledgment or payment he obtains a new period of limitation under sec. 19 or sec. 20 of the Act. Supposing the plaintiff is a minor at the date of the acknowledgment or payment, from which date the *new period* is to be *reckoned*, his case falls under the strict wording of sec. 7. Sec. 9 of Act XV does not take away this privilege, since it is not *subsequent disability* which stops the time already running, but the operation of *law* consequent upon the giving of the acknowledgment or the making of the payment. The old period which was running is not *extended*

Acknowledgments or payments to a minor against whom time has already commenced to run.

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[2] See Owen *v.* De Beauvoir, 16 M. & W., 567, cited in Banning on Limitation, p. 136.

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but *terminated* by the acknowledgment or payment. An *entirely new* period is allowed from and *exclusive* of the date of acknowledgment or payment, and the minor plaintiff may bring his suit within the extended time (three years or less), allowed by sec. 7, from the date of the cessation of his disability. He is not bound to sue within the new period allowed by sec. 19 or sec. 20. His suit is not barred even if that period expires before the extended time allowed by sec. 7.[2a] The same principle is applicable to the case of lunatics and idiots.

Arts. 44 and 94.

In cases where the period of limitation does not ordinarily commence to run, according to Schedule II, until after a particular disability has ceased, as in suits by wards who have attained majority to set aside sales by their guardians, or suits for property which the plaintiffs have conveyed while insane (see arts. 44 and 94), the provisions of sec. 7 of Act XV do not apply, unless a *second* disability overtakes the plaintiffs on or before the date fixed as the starting point of limitation.

Cessation of disability, a statutable cause of action.

Proviso.

The *cessation* of disability (single, double, or successive) is a *statutable* cause of action from which the *person freed from disability* is entitled to compute the prescribed period of limitation. *Provided* that if such period *exceeds* three years, he is not entitled to the *full* period, but only to three years from the date of the cessation of disability. If the plaintiff was born on the 1st of January 1870, and attained majority on the 1st of January 1888, the three years will end on the 1st January 1891. He was (according to the Indian Majority Act) a minor on the 31st of December 1887. His disability ceased on the 1st of January 1888, and he will be in time if he sues "within three years *after* the disability has ceased." (See *Jugmohun* v. *Luchmeshur*, I. L. R., 10 Calc., 748, 751; *Lester* v. *Garland*, 15 Ves., 248).

Death under disability, a statutable cause of action.

A transferee, creditor, or legal representative of a person, who has been *freed* from disability, is not entitled to the privilege conferred by sec. 7. But if the person first entitled to sue *continues* to be under disability up to the time of his *death*, his *death* is, subject to the *proviso*, a statutable cause of action to his *legal representatives*, even where they themselves are under no disability.

Proceedings *may* be taken *during* the period of disability.

Minors, idiots, and insane persons are *not forbidden* to sue (by their next friends) *before* the cessation of disability. The law does not say that they "may institute the suit or make the application *after the disability has ceased*, within the same period as would otherwise have been allowed," &c.,

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[2a] See Venkataram v. Kothandaram I. L. R., 13 Mad., 135.

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but that "they may institute the suit or make the application *within the same period*, after the disability has ceased, as would otherwise have been allowed," &c. The words "after the disability has ceased" *following*, as they do, the words "within the same period," pretty clearly indicate the real meaning of the Legislature. It cannot be the policy of the law to postpone the trial of claims, and it is unreasonable to hold that a claim which is not barred is to be thrown out because it is asserted too soon rather than too late. The next friend of the person under disability may bring a suit or make an application at *any time* during the continuance of the disability whether the *ordinary* period of limitation has already expired or not.[3]

The existence or non-existence of a guardian or committee does not affect the privilege which is conferred on the plaintiff in cases of legal disability.[4] The right to sue is that of the minor, the insane person, or the idiot. He is no doubt bound by any act lawfully done on his behalf by a properly constituted guardian, but if he has a right to sue, and that right has not been exercised on his behalf by his guardian, it exists, and may be exercised by him within a certain time after the cessation of the disability, or on his behalf by his next friend at any time before he is qualified to act for himself.[5]

The existence of a guardian does not affect the privilege.

The provisions of the law in favor of persons under disability are *personal* privileges and exemptions attaching to the *person* only, and not to the property or the title of those who are under disability. The reason why such persons are not subjected to the ordinary rules of limitation is, that the law considers them incapable of forming a proper judgment as to bringing suits, or otherwise managing their own affairs.[6] It is only when their disability continues up to the time of their *death*, and they have *no* opportunity of asserting their rights, that their *legal representatives* are allowed to claim the special protection afforded by the law.[7] A person who *purchases or otherwise acquires*

Disability confers a *personal* privilege.

Assignees not entitled to the privilege.

[3] Musst. Phoolbas *v.* Lalla Jogeshur, 25 W. R., 285, P. C.; (S. C.), I. L. R., 1 Calc., 226; Banning, p. 83; Baldeo Sing *v.* Kishenlall, I. L. R., 9 All., 411; Monmohun *v.* Gunga, 11 C. L. R., 34; I. L. R., 9 Calc., 181.

[4] See Mahipatrav *v.* Nensuk, 4 Bom., 199; Anantharama *v.* Karuppenan, I. L. R., 4 Mad., 119; Troup *v.* E. I. Co., 7 Moore's I. A., 104.

[5] See Sheikh Khoda Bux *v.* Budri Narain, 8 C. L. R., 306; (S. C.), I. L. R., 7 Calc., 137, and the cases cited therein—Jagjivan *v.* Hasan, I. L. R., 7 Bom., 179; Bhikaji *v.* Purshotam, I. L. R., 10 Bom., 220.

[6] See the judgment of Garth, C. J., in Rudra Kant *v.* Nobokishore, I. L. R., 9 Calc., 663, F. B.; 12 C. L. R., 269.

[7] It would seem that if the person first entitled to sue dies one day *after* the cessation of disability, his son or other legal representative

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their right to sue, either *during* the continuance of their disability (in execution of a decree against them, or from their guardins), or *after* the cessation of their disability, is not entitled to compute the period of limitation from the *statutable* cause of action, which sec. 7 of Act XV of 1877 gives to the original holders of the right. As against the purchaser or transferee, time runs from the *actual* cause of action or the *ordinary* starting point of limitation.[s] It has been held in America also, that the *grantee* of one who might have availed himself of the disability of infancy is not entitled to avail himself of that exception.[sa] The transfer of the right of a person under disability does not carry with it his personal exemption from the ordinary rule of limitation. In some cases, the purchaser, instead of taking from the person under disability an *absolute* transfer of property not in his possession, may enter into a contract for purchase, to be completed when the property shall have been recovered by suit. If he cannot protect himself in this way, or in any other way, he cannot, as the law stands, expect to enforce his purchased right when it has been barred by the *ordinary* rule of limitation. As the law does *not* say that the *alienation* of the estate of a person under disability shall, so far as that estate is concerned, be *deemed* to be a termination of the disability to *extend* the exemption to the alienee is to allow him, *without any excuse*, to sleep upon his rights with impunity, so *long* as the alienor continues to be under (actual) disability and for three years afterwards.[s]

Assignees not entitled to the privilege.

Hard cases under the existing law.

It is possible that, in some cases of such alienation the alienee may find himself, on the very date of the alienation, barred by the *ordinary* rule of limitation, and it may perhaps seem rather hard (specially in cases of involuntary alienation) that a right which was enforceable

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(even when he is himself under disability) cannot claim the exemption granted by sec. 7. The legal representative, in such a case, must bring his suit within the ordinary period from the ordinary starting point of limitation. He cannot have the advantage of the allowance of three years from the cessation of his predecessor's disability.

[s] Mahomed *v.* Eakoob, 24 W. R., 181; and Rudra Kant *v.* Nobokishore, I. L. R., 9 Calc., 663, F. B.

Section 11 of Act XIV of 1859 might bear a *different* construction. The language of the section gave the statutable cause of action, and the advantage of the three years' allowance, to the person who laboured under disability and to *all* his representatives, whether he *died* under disability or not. The English law on the subject of the *purchaser's* right to the exemption is not free from doubt. See Banning, p. 136.

[sa] Buswell, paragraph 103, note.

[s] See the judgment of Garth, C. J., in Rudra Kant *v.* Nobokishore, I. L. R., 9 Calc., 663, F. B.

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the day *before* the alienation ceases to be enforceable the very next day. Hard cases, it is said, make bad law. But the Judge and the Lawyer should *avoid* this result. They should not put a *forced* construction[10] upon a law which is expressed in clear and precise terms to avoid what they consider to be a hardship. The same remark applies to other similar cases. If a person to whom a right to sue *has accrued* should die immediately thereafter, leaving a minor son, the ordinary period of limitation might expire during the minority of such son, and he might have no opportunity of asserting a right which his father had not time to assert.[1] So, again, if a cause of action accrues to a minor, and he dies one day *after* attaining his majority, his legal representative (whether he is himself a minor or not) may find himself barred by the ordinary rule of limitation, from asserting a right which his predecessor, if alive, could have asserted within the time allowed from the date of his majority. (See *Abhaya* v. *Hari*, 10 W. R., 285).

Hard cases under the existing law.

The cessation of disability under Act XIV of 1859 was a statutable cause of action to the person labouring under disability, as well as to his representatives. The action might be brought "by such person or *his representative* within the same time" after the disability had ceased, &c. Under Act XV (as well as under Act IX) the *cessation* of disability is a statutable cause of action to the person who has laboured under the disability, while his *death* (if the disability continues to the time of his death) is a statutable cause of action to his legal representative.[2] If there is

To whom is cessation of disability, or death under disability, a cause of action.

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[10] See the judgment of Mitter, J., in the Full Bench case cited above.

[1] Thompson, 2nd Edition, p. 277.

[2] Under Act XIV "his representative," under Act IX his "representative in interest after his death" were, and under Act XV "his legal representative after his death" are, under certain restrictions, entitled to the benefit of the exception. Under sec. 179 of the Indian Succession Act (X of 1865) and sec. 4 of the Probate and Administration Act (V of 1881), the executor or administrator of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. As regards persons governed by the Indian Succession Act, *none* but an executor who has taken out probate, or an administrator who has obtained letters of administration, can be their legal representative. (Pogose *v.* Bibee Diskhoon, 2 C. L. R., 278). As regards Hindus in the Lower Provinces of Bengal, and the towns of Madras and Bombay, if the deceased does not die intestate, his executor or administrator with the will annexed is his *only* legal representative (Act XXI of 1870). If the executor dies without having fully administered the estate of the testator, the estate remains unrepresented until administration *de bonis non*, under sec. 45 of Act V of 1881 is taken out. The *devisee*, as such, can not sue for arrears of rent of the land devised to him by the testator, for he does not *represent* the estate. (Narasimmulu *v.* Gulam, I. L. R.,

Who are legal representatives?

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no break in the continuity of the disability of the person first entitled, and his legal representative is also under disability (single, double, or supervening) from the time of his death, the cessation of the disability of such representative is, to him, a statutable cause of action under Act XV. It is, however, not provided that if such disability of the *legal representative* continues up to *his death*, that *his* legal representative shall have any extension of time under sec. 7.

Representative's representative.

Although the cessation of disability or the death of the person under disability is, under the special provisions of the law, a new starting point of limitation, *i.e.*, a statutable cause of action, Act XV does not, as the Regulations did,[3] give the plaintiff, in *all* cases, the *full* period of limitation from the date thereof.[4] He is entitled to the full period when such period is *three* years or *less*. In these cases, the plaintiff *shall* get an *extension* of time. In *other* cases (*viz.*, in suits under arts. 116—149, and in applications under art. 180 and part of art. 179) he is entitled only to three years from the *statutable* cause of action. In these latter cases, the *general* law *may* give the plaintiff a *longer* period than what he would be entitled to under sec. 7. He and all his representatives are in *all* cases entitled (under the *general* law) to the *full* period from the *actual* cause of action, or the *ordinary* starting point of limitation. For sec. 7 is an additional or supplementary provision intended to make a special concession in favor of persons labouring under a disability. Were it otherwise, the disability, instead of being an advantage to them, might, in many cases, turn greatly to their detriment. The person labouring under a

The law allows the maximum period of three years from the statutable cause of action, or the full period from the ordinary starting point of limitation.

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16 Mad., 71. See also De Souza *v.* Secretary of State, 12 B. L. R., 428). As regards *other* Hindus, and persons *exempted* from the operation of the Indian Succession Act, the grantee of probate or administration, alone, is their legal representative if probate or administration has been *applied for and granted* (sec. 82, Act V of 1881); if probate or administration has not been applied for and granted, their heirs or devisees are their legal representatives. (See Greender *v.* Mackintosh, 4 C. L. R., 193, 210). As to who else may or may not be their legal representatives for the purpose of being sued or proceeded against, see Prossunno *v.* Kristo, I. L. R., 4 Calc., 342; Syud Nader *v.* Bishen Chund, 2 Shome's Reports, p. 62; Dhoronidhur *v.* Agra Bank, I. L. R., 5 Calc., 86. In sec. 10, Act XV of 1877, the Legislature uses the term 'assigns,' as *opposed* to the term 'legal representatives.'

Heirs or devisees may in some cases be legal representatives.

[3] Kishen *v.* Mudden, 5 W. R., 32, 33.

[4] The *full* ordinary period is allowed where it is either 10, 15, 20, 30, 60, or 90 *days*; or 6 months; or 1, 2, or 3 years. Where the ordinary period is 6, 12, 30, or 60 *years*, only 3 years are allowed from the *statutable* cause of action under sec. 7. Ten days is the minimum period (see art. 158), and three years the maximum period, allowed from the statutable cause of action.

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disability is not obliged to avail himself of the provisions of sec. 7, unless the three years' allowance from the statutable cause of action gives him a *longer* time than the ordinary period from the ordinary starting point of limitation.[6] Illustrations (*e*) and (*f*) under sec. 7 show that the intention of the Legislature, in enacting that section, was to give plaintiffs, under certain circumstances, an extension of time, and *not to shorten* the *ordinary* period in any case.[6] Where the disability ceases after a *short* time, and no extension of time is obtainable[7] under the section, the plaintiff gets, as a matter of course, the *full* period from the *usual* starting point of limitation allowed by the *ordinary* law.

Persons under disability, *not obliged* to avail of provisions of sec. 7

If an acknowledgment or payment (under sec. 19 or 20) be made to a creditor who is labouring under a disability, he is entitled to the full period from the date of acknowledgment, and is not confined to three years from the cessation of disability.[8] If the full term of the new period allowed expires before the cessation of the disability, the suit against the debtor may be instituted within the three years allowed by sec. 7 from the date of such cessation.[8a]

Acknowledgment or payment to persons under disability.

As the disability (single, double, or successive in the same person or in different persons) may continue for an indefinite period, the Indian Legislature might have fixed a certain period as the *extreme limit* after which the existence of disability was to be no excuse for the non-prosecution of claims. Idiocy or insanity may last for sixty, or even hundred years, and minority in successive persons may continue for upwards of forty years. Possession for forty, sixty, or hundred years may, as the law now stands, be disturbed by

No fixed limit to the indefinite extension of time under sec. 7.

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[5] Kalee Doss *v.* Behari, 2 W. R., 305; Behari *v.* Beni Lal, I. L. R., 3 All., 408, 412. See also Bahur *v.* Sookea, 13 W. R., 63; Ramanuja *v.* Venkata, 4 Mad., 54; Sookhmoyee *v.* Raghubendro, 24 W. R., 7, 8, 10; and Radhamohun *v.* Mohesh, 7 W. R., 3.

[6] See p. 248 (note), *supra*.

[7] Where the ordinary period of limitation is 6, 12, 30, or 60 years, and the three years, allowed from the *cessation of disability*, or the *death* of the person affected thereby, end *before* the termination of the 6, 12, 30, or 60 years, calculated from the *ordinary starting point* of limitation, sec. 7 of Act XV does not give the plaintiff any extension of time, that is, does not give the plaintiff longer time than what he would be entitled to under the ordinary law. This question could not arise under the Regulations, as the plaintiff did in *all* cases get the *full* period after the cessation of the disability, where such disability had existed from the time the cause of action accrued; and where a disability supervened after a part of the period had expired, he got the remainder of the full period from the cessation of such disability.

Cases where sec. 7 does *not extend* the ordinary period.

[8] See Brown, 622.

[8a] Venkata *v.* Kothanda, I. L. R., 13 Mad., 135. See p. 242 *supra*.

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a person who is entitled to the exemption allowed by sec. 7. To avoid this difficulty, Sir James Colvile, in his Limitation Bill, proposed to fix an extreme limit of 18 years in cases of disability.* In England under the 3 and 4 Wm. IV, c. 27, sec. 17 (which applies to real property only) the extreme period allowed was forty years, and recently by 37 and 38 Vic., c. 37, sec. 5, this period has been reduced to thirty years from the time when the right to sue first accrued.

An exception to the exception. Pre-emption suits.

In suits to enforce the right of *pre-emption*, the indefinite extension of the period of limitation, where the pre-emptor is labouring under a disability, would greatly increase the evils resulting from such an obnoxious right,[10] specially in the Punjab[1] where the right is not forfeited by reason of the preliminary forms of claim, required by the Mahomedan law, not being gone through. This is why this class of suits has, now for the first time, been excluded from the operation of the exception as to disabilities.[2]

Disability of *some* of several *joint* claimants. Sec. 8.

The grammatical meaning of the words of sec. 7 covers cases in which there is either *one* claimant and *he* is a minor (or under some other disability) or in which there are *several* claimants and *all* of them are minors (or under some other disability).[2a] Where *some* only of several joint claimants are under any disability and when a full *discharge* can be given by the others *without the concurrence* of the former, time will run against all the claimants and none of them will get the benefit of sec. 7. Sec. 8, Act XV of 1877, extends the provisions of sec. 7 to cases where *one* or some of several *joint* claimants *cannot* give a full discharge without the concurrence of the others. If some or all of *these others* are under any disability, time does not begin to run even against those of the joint creditors or claimants who can act for themselves, and are *sui juris*.

Section 8 of Act XV[3] (as well as of Act IX) substantially adopts the following rule laid down by Messrs. Darby

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* See secs. 11 and 22 of the amended Limitation and Prescription Bill, 1859.

[10] Raja Ram *v.* Bansi, I. L. R., 1 All., 207.

[1] See the proceedings of the Legislative Council, 19th February 1871.

[2] Under Act XIV of 1859, it was held in one case that the right of pre-emption could not remain suspended by reason of the plaintiff's disability. (Meer Murtaza *v.* Lalla Nursingh, 7 W. R., 86); but this decision was contrary to the language of the Act. (See Jungoo *v.* Alum, 7 W. R., 279, and the decision of the Allahabad High Court in the case cited in note 10).

[2a] Seshan *v.* Rajgopala, I. L. R., 13 Mad., 236, 240. See also Perry *v.* Jackson, 4 T. R., 519.

[3] For the old law on the subject, see Musst. Bolakee Koomaree *v.* Luckhemonee, Calc. Sud. Dew. Reports for 1850, p. 349. It was

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and Bosanquet at page 136 of their treatise on the Statutes of Limitation :—

"Where money is payable to several persons jointly, and one or more of them is under any such disability as before mentioned (minority or unsoundness of mind), it is apprehended that if from the fact of such persons being partners or executors or from any other cause, a discharge can be given without the concurrence of the persons under disability, time will run as against all, but otherwise it will not run as against any until all are free from disability."

Disability of *some* of several joint claimants.

Section 8, however, is not confined to claims for *money* and is expressly made applicable to joint *claimants* as well as to joint *creditors*. The word "discharge" in the section is also sufficiently large to include the "release" of any claim.[4] The claim, however, must be a *joint* claim which cannot (in the absence of an *express* statutory provision like that contained in sec. 231 of the Code of Civil Procedure) be enforced by any of the claimants without joining the others.[5] A joint promise or a joint decree in favor of two

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English and American law

held in that case, that if one of two co-sharers of a taluk was a minor, that would excuse *his* delay in suing in respect of such taluk. So it has been held in England and America that where adverse possession has existed during the period of limitation against tenants in *common*, one of whom is within the saving clause of the statute, the rights of the *others* are *not* thereby saved. (Roe *v.* Rowlston, 2 Taunt., 441 ; Buswell, p. 182). It has also been held in America that when the statute runs against *one* of two parties entitled to a *joint* action, it operates as a *complete* bar to such joint action. (Buswell, p. 183). Sec. 8 of the Indian Limitation Acts of 1871 and 1877 expressly enacts a *partially different* rule.

[4] See Sweet's Law Dictionary.

Must *all* contractees, co-owners, or co-heirs *join* in suit?

[5] Co-owners as well as co-contractees must all join in bringing a suit. (Ramsebuck *v.* Ramlall, I. L. R., 6 Calc., 815 ; Kalidas *v.* Nathu, I. L. R., 7 Bom., 217, 221 ; Balkrishna *v.* The Municipality, I. L. R., 10 Bom., 32). In this last case, it has been laid down that "unless there is a special provision of law (such as sec. 30 of Act XIV of 1882) co-owners are not permitted to sue through some or one of their members, but that all must join in a suit to recover their property." See also Kathesheri *v.* Vallotil, I. L. R., 3 Mad., 234. In the case in I. L. R., 10 Bom., the plaintiff who was a sharer with other members of his family was not allowed to recover possession of a piece of land on which the defendant had *constructed a wharf*. A co-sharer alone may, however, sue for *joint possession* of his *share* against a trespasser who claims under another co-sharer. Radha Prosad *v.* Esuf, I. L. R., 7 Calc., 414. The consent of one co-sharer to the possession of a trespasser does not make him less a trespasser with regard to the other co-sharers. Tuluk *v.* Ramjees, 5 N. W. P., 182. But though one of several co-sharers may sue to eject a *trespasser*, *so far as his interest* in the land is concerned, or in other words may sue for *joint possession* of *his share*, he cannot alone *eject* a *tenant* who has been put upon the land by *all* the co-sharers and is still holding under them. (Harendra *v.* Moran, I. L. R., 15 Calc., 40, at p. 46). In the

Building on land of co-owners.

Joint-possession of sharers.

Ejectment of tenant.

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Joint promisees and joint decree-holders.

or more persons fulfils this condition, for such a promise or decree must, in the *absence* of *express* law, be enforced by *all* the joint promisees or joint decree-holders.[5a] If several persons have a *joint cause of action*, and, in consequence of any disability of one or more of the joint claimants, it is impossible for the rest to sue, it is but fair that time should not run even against those who are under no disability.[6] But if the legal relation between the joint claimants is such that those of them who are *sui juris* can give a *discharge without* the *concurrence* of such of them as are *alieni juris*, the provisions of sec. 7 will not apply even to the latter. The *actual test* laid down by sec. 8 for the non-application of sec. 7 is *not* the power of some of the joint claimants to *protect* the interest of the others, but their power to *discharge* the defendant without the concurrence of the others. Where such concurrence is *necessary*, and the defendant cannot be discharged of his obligation during the disability of *any* of the claimants, even those of the claimants who are under no disability may take advantage of the provisions of sec. 7. In the case of a *joint decree* in the names of A, B, and C, no one of them can give a valid discharge without the concurrence of the others.[5a] On an application for execution by one or some

Sec. 7 does (or does not) apply, if *some* of them can not (or can) give a *discharge*.

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case of *several* heirs of a single creditor, it has been held that each heir of the creditor cannot, with reference to the provisions of the Certificate Act, XXVII of 1860, maintain a separate suit even in respect of his specific share. (Kandheyalall *v.* Chandar, I. L. R., 7 All., 313, F. B.)

Joint decree-holders, in Madras.

[5a] In Seshan *v.* Rajgopala, I. L. R., 13 Mad., 236, the Madras High Court held that where one of several joint decree-holders was a minor, his interest could be protected by those jointly interested with him, and he would not, therefore, be entitled to claim the privilege conferred by secs. 7 and 8 of Act XV. But it may be observed, that under sec. 231 of the Civil Procedure Code, it is the *Court* which *protects* the interest of the decree-holders who do not join in the application for execution. Besides, the *test* laid down by sec. 8 is not the ability of some of the joint claimants to *protect* the interest of the others, but their power to give a full *discharge* to the defendant without the concurrence of the others. See note 7, *infra*.

Joint right to *sue*.

Where a right to sue was vested jointly in A and a minor, it was held by the Bombay High Court that as A could not have given a *discharge* without the concurrence of the administrators of the minor's estate, sec. 8 applied to the claim. (Balkrishna *v.* Naro. Printed judgments of the Bombay High Court, 1888, p. 141; Starling, p. 32).

[6] Darby and Bosanquet, p. 39.

Joint *decree* to knock down a wall.

[5a] A joint *decree*-holder has *no* power to give a *discharge* (to the judgment-debtor) for more than his *own share* of the decree. (Musst. Bibi Budhan *v.* Musst. Hafeesah, 4 C. L. R., 70. See also Tarruck *v.* Devendro, I. L. R., 9 Calc., 831, at p. 836; Sultan *v.* Savaloyamal, I. L. R., 15 Mad., 343). But a joint decree to knock down a wall is of such a nature that it cannot be satisfied in *shares*. *Some* of the joint decree-holders cannot, even in such a case, give a *discharge*. They

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of several joint decree-holders, the duty of protecting the interest of the other joint decree-holders is cast upon the *Court*. (Sec. 231, Act XIV, 1882). Sec. 8 extends the provisions of sec. 7 to cases in which the *act* of one or some of the joint *claimants* is not *per se* a valid discharge.[6b] If at the time the decree is obtained *one* of the judgment-creditors is a minor, the *other* judgment-creditors *as well as* the *minor* may avail themselves of the provisions of secs. 7 and 8.[7]

Joint decree-holders.

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cannot, by foregoing their *own* right, defeat the right of the *others* to execute the decree. (Inderjeet *v.* Suvaram, 5 N. W. P., 16).

As to joint *promisees*, see notes 5 and 7.

[6b] See Seshan *v.* Rajgopala, I. L. R., 13 Mad., 236, at p. 240.

[7] See the judgment of Petheram, C. J., and Beverley, J., in Misc. Appeals Nos. 230 and 234 of 1886 (Bhagwati Persad *v.* Bibee Enayet), decided on the 19th November 1886. The decree in this case was based on a *contract*. Where a joint decree for possession of land is obtained in an action of *tort*, the same rule (as to the invalidity of a discharge) applies. (See Anando *v.* Anando, I. L. R., 14 Calc., 50, 54). In this last case, the learned Judges were of opinion that *all* the joint decree-holders must be minors or insane in order that the latter part of sec. 8 might apply to their case. But the *whole* of sec. 8 deals with cases in which "*one* of several joint-creditors or claimants is under any such disability." Illustration (*b*), under sec. 8, may *seem* to lend some support to the opinion of the learned Judges; but their opinion, it is respectfully submitted, is *opposed* to the unreported decision quoted above, to the language of sec. 8, and to the rule laid down by Messrs. Darby and Bosanquet. The *grammatical* meaning of the words of *sec.* 7 covers cases in which *all* the joint-creditors or claimants are under a disability. Sec. 8 is enacted to *extend* the provisions of sec. 7 to some of the cases in which *all* the joint-creditors or claimants are *not* under a disability. Mr. Starling is also of this opinion. (See Starling, 2nd Ed., p. 32). It should be noted that in Seshan *v.* Rajgopala (I. L. R., 13 Mad., 236, at pp. 239-241), a Division Bench of the Madras High Court held that joint *execution* creditors are not joint-creditors or claimants within the meaning of sec. 8, that a minor execution creditor (though the decree obtained by him is a *joint* decree, which cannot be satisfied without his concurrence) cannot get the benefit of sec. 7, and that sec. 8 cannot operate to save the statute in favor of the adult joint decree-holders. But see note 5.

No valid discharge by one of two joint decree-holders. Anando *v.* Anando, commented on. Madras ruling as to joint-decree-holders.

A cause of action for damages on account of a *tort* against *joint* owners, in case of the death of one of them, *survives* to the other, and not to the representative of the deceased. Chandra *v.* Bishwambhar, 1 B. L. R., 42. *Otherwise*, in case of joint *promisees*. (Sec. 45, Indian Contract Act).

Joint right to sue for a *tort*.

There are some cases in the English and Indian Law Reports which go to shew that payment to, or discharge by, *one* of two *joint*-creditors discharges the debt as to *both*. (Krishnarav *v.* Manaji, 11 Bom. High Court. 106; Ahamudeen *v.* Grish, I. L. R., 4 Calc., 350; Wallace *v.* Kelsall, 7 M. and W., 264. Brandon *v.* Scott, 26 L. J. Q. B., 163). But in cases of *money lent*, joint-creditors are, in *equity* and therefore in substance, treated as tenants in *common*, and *not* as *joint-tenants*, and accord and satisfaction with *one* of two joint-creditors is good only as regards *his* claim. (Steeds *v.* Steeds, 1889, 22 Q. B. D.,

Discharge by one joint-creditor at *law*, and in *equity*.

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One of two partners, executors, and (perhaps) members of a joint Hindu family can give a *discharge*.

Besides partners and executors, the members of a joint Hindu family,[8] it has been held in Madras, may supply an instance in which one of a number of joint claimants can give a *discharge* without the concurrence of the others. But it should be observed that one of several partners, executors, or members of a joint Hindu family,[9] cannot, *as such*, keep alive a liability, as against the others by an *acknowledgment* signed, or a *payment* made, by himself. (See sec. 21, Act XV).

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537). Where *trust* money is lent by two or more *trustees*, the interest of the *trustees* not being apportionable, they are treated as *joint* tenants even in equity. (*Ibid.*)

As a *rule*, *one* of two holders of a *joint* right can *not* give a *discharge*.

Whether a *joint* right to *sue* arises out of a *contract* or *tort*, and whether such right, on the death of any one of the joint holders of the right, devolves on the *survivors* or on the legal *representatives* of the deceased, it is apprehended, that as a *rule*, *one* or *some* of the holders of such a right, can *not* give a *discharge* without the concurrence of the others, *unless* they are all partners or executors or members of a joint Hindu family. A *joint* right to recover land on which a wharf has been constructed, a joint right to *eject* a tenant from joint land, or a joint right to recover *trust-money*, where such rights are *not apportionable*, are possibly *exceptions* to the rule. A joint *decree*, even if it is for knocking down a wall, can *not* be *discharged* by *some* of the decree-holders. One of the decree-holders cannot by foregoing *his* right defeat the right of the *others*. (See notes 5—7).

At *common law*, in the case of a joint bond in favor of A and B, payment to, or release by, A alone would prevent A and B from suing the debtor. The two creditors are treated as having a *joint* interest in the debt with its incident of survivorship, and discharge by *one* puts an *end* to the *joint* demand. (Wallace *v.* Kelsall, 7 M. & W., 264).

[8] Surju *v.* Kwahesh, I. L. R., 4 All., 512. It has been held, however, that sec. 8 does not apply to a case in which a bond in favor of a *minor* member of a joint family is sued upon. The majority of the other members, who are *not parties* to the bond, will not prevent the application of sec. 7. Yeknath *v.* Waman, I. L. R., 10 Bom., 241.

[9] The Hindu law does not seem to impose any "solidarity" of obligation on a group of successors, except as members of an *united* family, Stokes, Vol. I, p. 573. As to the power of a *manager* of a Hindu family, see Bhala *v.* Purbhu, I. L. R., 2 Bom., 67, 72. The *managing* member of a joint Hindu family, it has been held by the Madras High Court, has the same *authority* to acknowledge an unbarred debt as he has to create debts. (Chinnaya *v.* Gurunatham, I. L. R., 5 Mad., 169, F. B.) If shown to be an *agent* of the other members, the *karta* or manager may certainly keep alive a joint liability.

Powers of a managing member.

The Privy Council ruling in Durgapersad *v.* Keshopersad, I. L. R., 8 Calc., 656, does not establish anything more than that when an infant member of an undivided family *ought* to be a party to a *suit* by *name*, in order to be bound by it, he is not properly represented by the manager of the family, but must be represented by a duly appointed guardian. (Padmaker *v.* Mahadeo, I. L. R., 10 Bom., 21, 23. Cf. Hurrygopal *v.* Gokal, I. L. R., 12 Bom., 158). Ordinarily, the manager of a joint family under the Mitakshara is not the guardian of infant co-proprietors for the purpose of binding them by a bond or for the purpose of defending suits in respect of money advanced with reference to the estate. (Sham Kuar *v.* Mohanunda, I. L. R., 19 Calc., 301).

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LECTURE X.

ACKNOWLEDGMENTS.

Acknowledgments under sec. 14, Beng. Reg. III of 1793—Under sec. 4, Act XIV of 1859—Under sec. 1, cl. 15, and sec. 19 of Act XIV of 1859—Under Act IX of 1871—The changes introduced by Act IX—No *promise* to pay, deliver, perform or permit to enjoy is *necessary* in British India—Acknowledgments under Act XV of 1877—Amendments made by Act XV—1. Doctrine extended to any property or right.—2. Extended to *applications*.—3. The proviso to the doctrine *extended* to joint contractors and mortgagees.—4. Oral evidence of contents of written acknowledgments *entirely* excluded?—5. Omission of the provision that there must be "an unqualified admission of the liability as subsisting"—Requisites of an acknowledgment—*First*, as to the formalities.—The acknowledgment of *liability* must be in *writing*, duly *signed*—What may be proved by oral evidence—Whether sealing is signing—Marking is signing—What amounts to a signature—The signature may appear in any part of the writing—Instances of irregular signatures—Agent's signature of his own name sufficient—What acknowledgments should be stamped—What acknowledgments, if any, should be registered—Acknowledgments which are invalid on *other* grounds—*Secondly*, under sec. 19, the acknowledgment must be made *within* the period of limitation—Otherwise, under art. 180, Sched. II—*Thirdly*, what is, in terms, a sufficient acknowledgment—Instances of sufficient and insufficient acknowledgments—The liability acknowledged must be in respect of the *particular claim* of the plaintiff; but the *exact* amount or nature of the liability need not be *specified*—Admission of a *definite* smaller debt—Admission coupled with a conditional promise—Qualified admissions—Advertisement to bring in claims—Requisites of sufficiency—Rights of any kind may be acknowledged under Act XV—*Fourthly*, who must make the acknowledgment—Infants and their guardians cannot—Acknowledgment by executor or administrator of debtor binds his estate—Acknowledgment by a receiver—Acknowledgment by one of several joint debtors, &c.—Where the liability is not apportionable—Acknowledgment by one of several joint mortgagors, administrators, coparceners, or tortfeasors—By one of several joint tenants—Who are agents authorized to make an acknowledgment—Authority need not appear on the face of the writing—Authority to borrow—Authority to adjust accounts—Pleader's authority—Authority of the *kurta*—*Fifthly*, to whom must an acknowledgment (under art. 180) be made—The *effect* of a good acknowledgment—From the date of its being *signed* or *given*—A series of acknowledgments.

Acknowledgments under sec. 14, Beng. Reg. III of 1793.

THE exception in respect of acknowledgments of liability, by the party against whom a claim is made, has, to some extent or other, been always recognized by the Law of British India.

The first exception to the twelve years' rule of limitation under sec. 14, Reg. III of 1793 (Bengal Code), was

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where the plaintiff could show, by clear and positive proof, that he had (within twelve years before the institution of the suit) demanded the *money or matter* in question, and that the defendant had admitted the truth of the demand, or promised to pay the money. A simple acknowledgment of the truth of a demand, *after* the period of limitation had once fully elapsed, was not sufficient.[1] *Demand* by the plaintiff and *admission* by the defendant were *both* necessary to set time running again.[2] The exception was not confined to claims in respect of debts and legacies, but extended to *all matters*. *Oral* admissions, as well as admissions by *agents*,[3] were sufficient. Indirect acknowledgments by *part-payments* were also recognized in some cases.[4]

Under sec. 4, Act XIV of 1859.

Section 4, Act XIV of 1859, shut out inferences and deductions of all sorts,[5] and confined the exception to direct acknowledgments in *writing, signed* by the person who, but for the law of limitation, would have been liable to pay a *debt* or a *legacy*, distinctly admitting that the *debt* or the *legacy* or a part thereof was *due*. The signature of an *agent* of the defendant was not sufficient.[6] *Oral* admissions, or admissions in respect of matters *other*[7] than legacies and debts, were not recognized by sec. 4. But debts

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[1] Construction No. 196, Calc. Sud. Dew. The demand and the admission were required to be made within the prescribed period. Gopee Kishen *v.* Bindabun, 12 W. R., P. C., 36, 37.

[2] Macpherson (Civil Procedure), p. cxciii ; Calc. Sud. Dew. Report for 1855, p. 20.

[3] Macpherson, p. cxciii ; Calc. Sel. Rep., Vol. VI, p. 135.

[4] Macpherson, p. cxciii ; Calc. Sud. Dew. Report for 1845, p. 193.

[5] Gorachand *v.* Lokenath, 8 W. R., 335. See also Gash *v.* McLean, 2 N. W. P., 403 ; Lutchman *v.* Mutta, 5 Mad., 90. But the balance in an account stated, if signed, was *deemed* to be acknowledged as *due*. See Andarji *v.* Dulabh, I. L. R., 5 Bom., 88.

The word "due."

The word "due" in sec. 4, Act XIV of 1859, did not necessarily mean that the debt or legacy was *already payable*, but that there was an existing obligation to pay it. The word meant *owing* rather than *payable*. (See Nijamudin *v.* Mahammad Ali, 4 Mad., 384).

According to the ruling in Kristna *v.* Hachapa, 2 Mad., 307, it was *not* necessary that the writing should *express in terms a direct admission*.

[6] Beedoobhooshun *v.* Enaet, 8 W. R., 1. But an acknowledgment of the right to a decree of any of the Supreme Courts was sufficient even when signed by an *agent* of the judgment-debtor. Sec. 19, Act XIV of 1859.

Admissions of *right to property*.

[7] Admissions in respect of a right to property did not renew the period of limitation. (Amrita bin *v.* Anyaba bin, 5 Bom., 51 ; Lalla Doorga *v.* Lalla Luchman, 17 W. R., 272). The *right of redemption*, however, could be kept alive by an acknowledgment under sec. 1, cl. 15.

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already barred by limitation could be *revived* by a sufficient acknowledgment.[8]

There were two other provisions in Act XIV of 1859, which recognized an acknowledgment in writing, *viz.*, sec. 1, cl. 15, and sec. 19. By the first of these provisions, an acknowledgment of the *title* of a depositor, pawnor or mortgagor, or of his *right* of redemption, when in writing, signed by the depositary, pawnee or mortgagee, or some person claiming under him, renewed the period of limitation, if the acknowledgment was made *before* the expiry of the prescribed period.[9] By the second of these provisions, a written acknowledgment of the right to the principal money secured by a decree or order of a Court established by Royal Charter, signed by the debtor or his *agent, during* the currency of limitation, and *given to the party entitled thereto or his agent*, was a ground for renewing the ordinary period of limitation. An acknowledgment under sec. 4, or sec. 1, cl. 15, even if made to a third party,[10] was sufficient, but an acknowledgment under sec. 19 was required to be given to the party entitled or his agent. An acknowledgment under sec. 19 might be signed by an *agent* of the judgment-debtor, but an acknowledgment under sec. 4, or sec. 1, cl. 15,[1] was required to be signed *personally* by the party liable. And while an acknowledgment under sec. 4 might be made even *after* the expiry of the period of limitation, an acknowledgment under sec. 1, cl. 15, or sec. 19, was required to be made *before* the expiry of the prescribed period.[2]

Under sec. 1, cl. 15, and sec. 19 of Act XIV of 1859.

Act IX of 1871 did not alter the law, so far as acknowledgments of the right or title of the depositor, pawnor, and mortgagor,[3] or of the right to the principal monies secured by

Under Act IX of 1871.

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[8] See Valia Tamburattee *v.* Vira Rayan, I. L. R., 1 Mad., 228, 234; Heeralall *v.* Roy Dhunput, 24 W. R., 282, 284. The English law, so far as *debts* are concerned, is to the same effect. (Darby and Bosanquent, p. 54). But acknowledgments in respect of deposits, pledges, and mortgages to be effectual, were (even according to Act XIV of 1859) required to be made *before* the expiry of the prescribed period of limitation, and the same rule applied to acknowledgments of right to the principal monies secured by decrees of the Supreme Courts.

[9] Vasudavan *v.* Mussakutti, 6 Mad., 138; Mukkani *v.* Manam, I. L. R., 5 Mad., 182. See the construction put upon the words "in the meantime," used in cl. 15 as well as in the English Act, in Stanfield *v.* Hobson, 2 Smith's Leading Cases, 8th Ed., p. 746.

[10] Hurro *v.* Monee, 3 W. R., S. C. C., 6; Dur Gopal *v.* Kasheeram, 3 W. R., 3; see also 5 Bom., 176.

[1] Luchmeebux *v.* Runjeet Ram, 20 W. R., 375, P. C.

[2] Mukkani *v.* Manan, I. L. R., 5 Mad., 182. See also note (8), *supra*.

[3] Acknowledgments of the *title or right* of these persons were ineffectual if signed by *agents* of the makers, although acknowledgments

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decrees or orders of any Court established by Royal Charter, were concerned. Articles 147 and 148 of Act IX exactly corresponded to sec. 1, cl. 15, of Act XIV of 1859, and sec. 19 of the latter Act corresponded to art. 169 of the former Act, with this exception, that art. 169 did *not* say that the acknowledgment was to be given "in the meantime," *i.e.*, before the expiry of the period of limitation.

The changes introduced by Act IX.

In respect of debts and legacies Act IX introduced two important changes. In accordance with the English Mercantile Law Amendment Act (19 and 20 Vict., c. 97, sec. 13), an acknowledgment, signed by an authorized *agent* of the party to be charged thereby, was rendered as good as one signed by himself. And, in accordance with Construction No. 196 of the Calcutta Sudder Court, and sec. 14 of the Indian Law Commissioners' Bill (1841-42), it was enacted that the acknowledgment to be effectual should be made *before the expiration of the prescribed period* of limitation. The terms of the acknowledgment, in accordance with the decisions under the old law, were required to be such as to amount to an unqualified admission of a subsisting liability.

No *promise* to pay, deliver, perform or permit to enjoy is *necessary* in British India.

Otherwise at English common law.

Although the word 'promise' occurred in sec. 14, Reg. III of 1793, and in sec. 20, Act IX of 1871, no promise to pay was *necessary* to set time running again.[4] The principle of the decisions on the English Statutes (21 James I, c. 16, and 9 Geo. IV, c. 14) in actions of assumpsit is not applicable to similar cases in British India. Those decisions do not depend upon the effect of a *statutory exception*, but upon the principles of the *common law* with respect to the cause of action. It is incumbent on the plaintiff in assumpsit to prove a *promise* made within the period of limitation, and such as to agree with that laid in the declaration. When the acknowledgment amounts to a fresh promise to pay, that promise is considered as one of the causes of action which the declaration states. But acknow-

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of *debts* could be so signed under sec. 20, Act IX. (Rahmani *v.* Hulasa, I. L. R., 1 All., 642). Under Act XV *all* acknowledgments of liability may be signed by an *agent* of the party chargeable thereby.

[4] See Gopee Kishen *v.* Bindabun, 12 W. R., P. C., 36, 37. See Lecture X, *infra*.

Under the English Common Law, an *implied* promise is sufficient, but under sec. 20, Act IX of 1871, if a *promise* was relied upon as renewing the period of limitation, it was necessary that it should have amounted to an *express* undertaking to pay or deliver the debt or legacy. If an *acknowledgment* was relied upon, it should have amounted to an unqualified admission of the liability as subsisting. The 9 Geo. IV, c. 14, merely substituted proof by *writing* for *verbal* testimony of an express or implied promise to pay on request. (See Nijamudin *v.* Mahammad, 4 Mad., 335, at p. 390).

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ledgments, whether by words or in writing, are of no avail, save so far as they sustain the promise alleged; there is no *exception* to exclude the operation of the statute. The cases in which acknowledgments are operative by way of *exception* are of a different character. In these, the action must be maintained on the *orginal* security, and an acknowledgment within the prescribed period of limitation is sufficient, if it shows that the obligation was then subsisting and unsatisfied; a *promise* to pay (express or implied) is not required.[5]

Acknowledgments under Act XV of 1877.

Section 19 of Act XV of 1877 omits all mention of *promises* in connection with acknowledgments. But if there is a fresh promise in writing, and it does not amount to a novation,—that is, a new contract in substitution of the first,—the promise may be treated as a mere acknowledgment. And where there has been a novation, or where the promise is to pay a debt already barred by limitation, a suit may be maintained upon the new contract.[6] In such a case the *new promise*, and not the old debt, is the measure of the creditor's right. If the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him. If the debtor promises to pay when he is able, the creditor must show that the debtor is able to pay. If he fails to prove the debtor's ability to pay, the promise will be inoperative.[7] So far as decrees of Courts established by Royal Charter are concerned, the exception in respect of acknowledgments, in Act IX of 1871, is not altered or modified by Act XV of 1877. But the same exception is now extended to orders of Her Majesty in Council.

New promise.

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[5] Gopee Kishen *v.* Bindabun, 12 W. R., P. C., 36, 37. See the leading English case on the subject—Tanner *v.* Smart, 6 Barn. and Cr., 603, and Banning, p. 41. For acknowledgments by way of *statutory* exceptions in the English Law, see secs. 14, 28, 40, and 42 of 3 and 4 Wm. IV, c. 27, and sec. 5 of 3 and 4 Wm. IV, c. 42.

English *statutory* exceptions.

[6] The promise in sec. 20, Act IX of 1871, was a promise by way of exception, in a suit founded on the *original* cause of action, and not a promise constituting a new contract, and extinguishing the original cause of action. (See sec. 25, Act IX of 1872, and Roghoji *v.* Abdul, I. L. R., 1 Bom., 590). An unaccepted promise (or rather *offer*) to pay might, of course, be treated as an *acknowledgment*.

[7] See Chasemore *v.* Turner, L. R., 10 Q. B., at p. 505; Banning, p. 43; Philips *v.* Philips, 3 Hare, 281, 299; Watson *v.* Yates, I. L. R., 11 Bom., 580.

A *conditional* promise or offer to pay, made *before* the debt is barred by limitation, may, however, in most cases, be treated as an *acknowledgment* of a subsisting liability; and, as such, may give the creditor a fresh start, although the *condition* is not fulfilled.

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Amendments made by Act XV.
1. Doctrine extended to any property or right.
2. Extended to *applications.*

Acknowledgments of the right of redemption, or of the title of the depositor, pawnor or mortgagor are no longer *separately* provided for. The general exception in respect of acknowledgments (sec. 19 of Act XV of 1877) is so enlarged as to include such cases within it. The general exception is no longer confined to acknowledgments in respect of debts and legacies, but is extended to acknowledgments is respect of *any property or right.*[s] And it is expressly provided that the limitation periods of *suits*, as well as of *applications*,[s] shall be renewed by acknowledgments under sec. 19.

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[s] Cf. sec. 19 of Act XV with the corresponding sections of Act XIV of 1859, and Act IX of 1871. See also Starling, 2nd Ed., p. 63, and Faki *v.* Khotee, I. L. R., 4 Bom., 590. Under the old Regulations also, the exception was not confined to suits for debts and legacies. The 3 & 4 Wm. IV, c. 27, sec. 14, provides for acknowledgments of title to land or rent. Under English law, in the case of *torts*, no acknowledgment is sufficient to bar the statute. (Angell, sec. 209; Banning, p. 40; Buswell, p. 53; Hurst *v.* Parker, 1 B. and Ald., 92; Tanner *v.* Smart, 6 Bar. and Cress, 603). In an action of *tort* the cause of action alleged in the declaration, *not* being a *promise* to pay (as it is in an action of *assumpsit*), the English Common Law doctrine of acknowledgment is *not applicable* to torts. See p. 276, *supra.*

Acknowledgment in cases of *tort.*

Is acknowledgment of *title*, an acknowledgment of *liability?*

Under Act XV, a question may arise as to whether an acknowledgment of the mortgagor's *title* is sufficient, if there is no express acknowledgment of *liability* on the part of the mortgagee. It will probably be held that a mortgagee's acknowledgment of the mortgagor's *right to redeem* is an acknowledgment of the mortgagee's *liability* to be redeemed. Similarly a written statement that the defendant holds the property as a *mortgagee* may be a sufficient acknowledgment of the mortgagee's (immediate or deferred) *liability.* See Bishesar *v.* Bhagi, 5 Weekly Notes, 211; Rivaz, 3rd Ed., p. 69; Daia Chand *v.* Sarfraz, I. L. R., 1 All., 117.

[s] Under the Regulations, the period of limitation in cases of applications for the execution of decrees was extended for any reason which seemed good and sufficient to the Court. (Thompson, 2nd Ed., p. 344). Under Act XIV there were contradictory decisions as to the application of the exceptions to execution cases. As to admissions and acknowledgments of judgment debts, see Digamburee *v.* Sharoda, 3 W. R., Misc., 27; Chunderkant *v.* Ramnarrain, 8 W. R., 63. But in Musst. Luchman *v.* Luchman, 7 W. R., 79, sec. 4 was held to be inapplicable to execution cases. As to *legal disability*, see Anubdee *v.* Takoor, 4 W. R., Misc., 21; Jugmohun *v.* Luchmeshur, I. L. R., 10 Calc., 748. But in Rotty Romun *v.* Chunder, 5 W. R., Misc., 10; Taruckmath *v.* Poorno Chunder, 8 W. R., 137; and Mothoora *v.* Shambhu, 20 W. R., 53, sec. 11, Act XIV, was held to be inapplicable. See also p. 260, *supra.* The exception as to proceedings in a *wrong* Court was held to be inapplicable to execution cases. (See Khetter Nath *v.* Gossain Dass, 4 W. R., Misc., 18). But in Hurro Chunder *v.* Shoorodhoni (9 W. R., 402, F. B.) it was held that this exception (sec. 14, Act XIV) applied to execution proceedings as well as to suits. In Dursiah *v.* Godain, 4 Mad. Jurist, 101, it was held that the exception as to *absence* from British India under sec. 13, Act XIV of 1859, was inapplicable to execution proceedings. But there being no definition of the word *suit* in Act XIV of 1859, it was held, in the most recent

Conflict as to the application of exceptions under Act XIV, to execution proceedings.

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3. The proviso to the doctrine *extended* to joint contractors and mortgagees.

Section 4 of Act XIV of 1859 provided generally, that if more than one person was liable, none of them should become chargeable by reason only of a written acknowledgment signed by another of them.[10] Section 20 of Act IX of 1871 specially provided that one of several *partners* or *executors* should not be so chargeable. Act XV of 1877 (sec. 21) extends this provision to joint contractors and mortgagees, so that one of several joint contractors, partners, executors or mortgagees is not chargeable by reason *only* of a written acknowledgment signed by, or by the agent of, any *other or others* of them. To render him chargeable it must be *shown* that the partner or other person signing the acknowledgment, had authority, express or implied, to do so. In a going mercantile concern such agency is ordinarily *presumed*.[1]

Oral evidence of acknowledgments under Acts XIV and IX.

In Act XIV of 1859 there was no provision which excluded *oral* evidence of the *contents* of a written acknowledgment in cases where, under the ordinary rules of evidence, the contents of a writing could be proved by secondary evidence. In *Haydon* v. *Williams* (7 Bing., 163) it was held that such evidence was receivable in England.

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case, that "any proceeding in a Court of Justice to enforce a demand" was a *suit*, and that the exceptions did apply to execution proceedings as well as to suits. (See Jugmohun *v.* Luchmeshur, I. L. R., 10 Calc., 748).

Applications, under Act IX

Under Act IX of 1871, it was held that the word "suit" in that Act did not include "applications for execution" (Dhonnesshur *v.* Roy Gooder, I. L. R., 2 Calc., 336, F. B.; Jiwansingh *v.* Sarnamsingh, I. L. R., 1 All., 97, F. B.) But see the opinion of Stuart, C. J., in the last case, and the Privy Council ruling on sec. 1, Act IX of 1871, in Mungal Persad Dichit *v.* Girija Kant Lahiri, 11 C. L. R., 113. In Mungol *v.* Shamakanto, I. L. R., 4 Calc., 708, it was held that sec. 20 of Act IX of 1871 did not apply to judgment-debts. (See also Kally Prosunno *v.* Heeralall, I. L. R., 2 Calc., 468; Ishan *v.* Grija, 3 C. L. R., 572). But the correctness of this decision was questioned by Stuart, C. J., in Ramhit *v.* Satgar, I. L. R., 3 All., 247, F. B.

Under Act XV.

Under Act XV it has been held by the Calcutta, Bombay, and Allahabad High Courts that a right to enforce a decree of a Court is a *right* within the meaning of sec. 19 (see Ram Coomar *v.* Jakur, I. L. R., 8 Calc., 716; Toree Mahamed *v.* Mohomed, I. L. R., 9 Calc. 738; Venkatrav *v.* Bijising, I. L. R., 10 Bom., 108; Ramhit *v.* Satgar, I. L. R. 3 All., 247; Janki *v.* Ghulam, I. L. R., 5 All., 201; Fateh Mahomed *v.* Gopal, I. L. R., 7 All., 424). But the Madras High Court is of a *different* opinion. (See Rama Raw *v.* Venkatesa, I. L. R., 5 Mad., 171, F. B.) According to this ruling, sec. 19 is not applicable to applications in the course of suits or in execution of decrees, but it may apply to *other* applications, *e.g.*, applications under the law of landlord and tenant.

Otherwise in Madras.

[10] For decisions on this provision, see 3 Agra, 170; Chunderkant *v.* Ramnarain, 8 W. R., 63; 2 Mad., 84; and Thompson, p. 246.

[1] Premji *v.* Dossa, I. L. R., 10 Bom., 358; Gadu *v.* Pursotam, I. L. R., 10 All., 412, 418. Cf. Bhogilol *v.* Amritalol, I. L. R., 17 Bom., 173, at p. 176.

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But the Indian Legislature[2] refused to adopt this ruling, and sec. 28, Act IX of 1871, expressly enacted that *oral* evidence of the *contents* of the writing containing the acknowledgment should not be received when the writing was alleged to have been *destroyed or lost*. *Other* kinds of *secondary* evidence were, however, admissible to prove the contents of such a writing; and oral *as well as* other secondary evidence was receivable to prove the contents of the writing if it was in the *possession or power of the defendant*, *i.e.*, the person against whom it was sought to be proved.

4. Oral evidence of contents of written acknowledgments *entirely* excluded by Act XV.

Act XV of 1877, sec. 19, apparently, goes further, and excludes *oral* evidence of the *contents*, even where the original acknowledgment is in the *possession or power of the defendant*. *Oral* evidence of the *contents*, it would seem, is not admissible in any case.[3] *Other kinds* of secondary evidence of the acknowledgment, such as copies, may, of course, be received where a proper case is made out for their admission under sec. 65 of the Evidence Act. Under the first paragraph of sec. 19, the *acknowledgment of liability* is a "matter which is *required by law* to be reduced to the form of a *document*." The *time* when the writing containing the acknowledgment is signed is *not such a matter*. The writing may, therefore, be either *dated or undated*. The first portion of the second paragraph of sec. 19 expressly enacts that when the writing containing the acknowledgment is *undated*, (extrinsic) *oral evidence* may be given of the *time* when it was signed. When the writing *is dated, the date* becomes a *part* of the document, and the latter part of the second paragraph of sec. 19 *might have supplemented* the provisions of sec. 91 of the Evidence Act[3a] by enacting that the statement of the

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[2] See the Statement of Objects and Reasons of Sir James Stephen's Limitation Bill, which afterwards became Act IX of 1871. *Calcutta Gazette*, 14th December 1870. See also p. 53, *supra*.

[3] On the 19th July 1877, the Hon'ble Law Member of the Governor-General's Council, immediately before the passing of the Limitation *Bill*, said: "In sec. 19 (of the Bill) we had struck out the exception which allowed oral evidence to be given of an acknowledgment wrongfully *destroyed by the person upon whom it was binding*. The case was one which could seldom occur, since the plaintiff had ordinarily the possession of the document. We had thought it simpler to make no exception to the rule in this clause, which excluded oral evidence of such documents."

The words "when it is alleged to have been destroyed or lost" which occurred in clause (c), sec. 20 of *Act* IX of 1871, have been omitted. The full-stop which preceded these words has now been replaced by a semicolon. (Starling, 2nd Ed., p. 72).

[3a] Sec. 91 of the Evidence Act precludes the admission of *oral* evidence of the *matter* required by law to be reduced to writing, and of *the terms* of contracts, grants, and other dispositions of property.

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date in the writing should preclude the admission of *oral* evidence as to the *date*. But instead of doing that, the last nine words of the second paragraph (which are exactly the same as the last nine words of the corresponding clause of Act IX of 1871) provide that *oral evidence* of the *contents* of the writing containing the acknowledgment shall not be received. Oral evidence of the *contents of a writing* is certainly not the same as (extrinsic) oral evidence of the *facts* stated in the writing. The former is treated of in secs. 63 to 65 of the Indian Evidence Act, I of 1872, and the latter in secs. 91 and 92 of the same Act. Oral evidence of the *contents* of a document is a species of *secondary* evidence. Oral evidence of the *terms, facts* or other *matters* stated in a document, if admissible, is *not secondary*, but independent, original, and extrinsic evidence of those terms, facts or matters. But it has been held in Calcutta and Madras that the whole of the second paragraph of sec. 19, Act XV of 1877, belongs to that branch of the law of evidence which is dealt with by secs. 91 and 92 of the Indian Evidence Act, and that it does *not* exclude *oral* evidence of the *contents* of an acknowledgment which has been lost or destroyed, or which is in the possession of the defendant, and he does not produce it after notice.[4] It has been observed, however, that though the first paragraph of sec. 19 requires an acknowledgment of liability

Clause 2, sec. 19.

Calc. and Mad. rulings

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[4] Shambhu *v.* Ramchandra, I. L. R., 12 Calc., 267. See also Wajibun *v.* Kadir, I. L. R., 13 Calc., 292, and Chathu *v.* Virarayan, I. L. R., 15 Mad., 491. Mr. Starling says that the last ten words of clause 2, sec. 19, "seem to be of no use whatever in the section in its present form." But under the ordinary rules of interpretation (see p. 196, *supra*) some *effect* should be given to these words. And West and Birdwood, JJ., in the recent case of Ziulnissa *v.* Motidev, I. L. R., 12 Bom., 268, gave due effect to these words by *excluding* oral evidence of the contents of one of a series of acknowledgments which appeared to have been returned to the debtor and was not forthcoming.

Some effect should be given to latter part of cl. 2, sec. 19.

Mr. Starling points out that there has been a change in the punctuation,—the full-stop in cl. c, sec. 20, Act IX of 1871, being now replaced by a semicolon in cl. 2, sec. 19 of Act XV, and that what in Act IX formed an *independent* sentence by itself, now forms *part* of a sentence relating to an undated acknowledgment. (Starling, p. 72). I have not commented on the punctuation of the sentence in clause 2 of sec. 19, Act XV, because "it is an error to rely on *punctuation* in construing Acts of the Legislature." (See the Maharanee of Burdwan *v.* Krishna Kamini, I. L. R., 14 Calc., 365, at p. 372, P. C.) The speech of the Hon'ble Law Member, if it may be referred to (see note 3, *supra*) shews that *no oral evidence* of a *document* acknowledging liability is to be received, even if the document has been wrongfully destroyed by the defendant. The interpretation put upon cl. 2, sec. 19 of Act XV, in Calcutta and Madras, assumes that the Legislature has *unnecessarily* retained the last ten words of this clause. Sec. 91 of the Evidence Act of 1871 is *quite sufficient* to exclude extrinsic oral evidence of written acknowledgments.

Punctuation should not be relied on.

Calc. and Mad. rulings give *no effect* to cl. 2, sec. 19.

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Clause 2, sec. 19.

to be reduced to writing, it does not enact that the date of the acknowledgment must appear in writing. The first portion of the second paragraph of sec. 19, by way of explanation, substantially enacts that the *date* of such an acknowledgment is *not* a matter which is required to be stated in writing. And as the second paragraph does not relate to the *terms* of a contract or of any disposition of property, nor to any *matter* which is *required by law* to be reduced to writing, it is apprehended that secs. 91 and 92 of the Evidence Act has no application to the subject-matter of that paragraph; and that the *latter* portion of that paragraph does *not* belong even to that *branch* of the law of evidence which is dealt with by those sections of the Evidence Act.

5. Omission of the provision that there must be "an unqualified admission of the liability as subsisting."

Act XV (sec. 19) omits that provision of Act IX which required that an acknowledgment must amount to "an unqualified admission of the liability as subsisting." But there must still be an acknowledgment of liability in respect of the property or right which is claimed by the plaintiff. Even under Act IX of 1871, coupling an acknowledgment (which was otherwise sufficient) with a claim to a set-off, or with a refusal to pay, or an allegation that the debt was not yet payable, was not such a qualification as would have destroyed the effect of an acknowledgment. Such qualifications (if they are qualifications at all) cannot, *à fortiori*, render an acknowledgment insufficient under sec. 19, Act XV of 1877.

Requisites of an acknowledgment.

The requisites[5] of a good acknowledgment under Act XV may be considered under the following heads:—

1. The acknowledgment must be made with the proper formalities.
2. It must (at least in cases governed by sec. 19) be made before the expiration of the prescribed period of limitation.
3. It must, in terms, be a sufficient admission of liability.
4. It must be made *by* the proper person.
5. It must, in the case of an application for enforcing a judgment, decree or order governed by art. 180, be made *to* the proper person.

First, the acknowledgment of *liability* must be in *writing*, duly *signed*.

With reference to the first head, Act XV requires that the acknowledgment must be made in *writing*, *signed* by the party to be charged therewith, or by his agent duly authorized in this behalf.

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[5] See Banning, p. 38.

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The acknowledgment need not be made in any particular form,[6] provided the *admission* of *liability* appears in a writing duly signed. The *identity*[7] of the debt, property or right in respect of which the acknowledgment is made, the *name*[8] of the creditor or the person entitled to the right or property, and the *date*[9] of an acknowledgment need not appear on the face of the writing, but may be proved by oral evidence.

What may be proved by oral evidence.

What is in common talk called an account stated must be in *writing*, and *signed* by the debtor in order that sec. 19, Act XV, might apply.[10] But in the case of *mutual* dealings where there are cross demands, if on a settlement of accounts, items agreed to on one side are wiped out by an appropriation to their discharge of admitted items of claim on the other side, and thereupon a balance is struck, the mutual agreement to set off, *pro tanto*, one set of items against the other, constitutes a *new* consideration for the promise to pay the balance so settled.[1] Even if this agreement is a

Account stated.

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[6] A letter, a deed, an affidavit or a will, may contain the required acknowledgment. (Brown, p. 658). A *plaint* filed by the debtor may contain an acknowledgment. (Narayan *v.* Bhaskar, 7 Bom., 25). A *record of rights* prepared at a settlement, if signed or attested as correct by the defendant, may amount to a sufficient acknowledgment. (Daia Chand *v.* Sarfraz, I. L. R., 1 All., 117). A *deposition* by the debtor containing his admission of the debt if signed by him *may*, according to Aiyar, J., be sufficient for the purposes of sec. 19. Wilkinson, J., however, is of opinion that a witness in signing such a deposition *does not consciously* admit his liability; and as without such conciousness there can be no acknowledgment, a deposition is not such a writing as was in the contemplation of the Legislature when framing sec. 19. (Mutharajee *v.* Kurmathoor, 3 Mad. Law Journal, 35). But whether the debtor in signing his deposition does so with the *knowledge* that he is admitting his liability is, *at best*, a question of *fact*; and the *presumption* is *against* the witness and debtor. Several writings may be relied on as containing the acknowledgment. (*Ibid.*, 654). But in Rogers *v.* Montriou indirect acknowledgments *deducible* from the *tenor* of a series of letters as inferences were considered insufficient, and it was held that there must be some principal document written on *an ascertainable date*, which can be relied on by itself (6 B. L. R., 550). As to *Wills*, see 3 Mad. L. J., 191.

Letter, deed, affidavit, will, record-of-rights, and deposition.

Document written on an ascertainable date.

[7] Parol evidence is admissible for the purpose of showing *what* debt or liability is referred to in the acknowledgment, and that the creditor alluded to under a particular name has another name. See Woomesh *v.* Eliza, 12 W. R., O. A., 2. See also Hartley *v.* Wharton, 11 A. & E., 934.

[8] Daia Chand *v.* Sarfraz, I. L. R., 1 All., 117, F. B.; Hartley *v.* Wharton, 11 Ad. and Ell., 934; Banning, p. 58.

[9] Sec. 20, Act IX of 1871, and sec. 19, Act XV of 1877; Hartley *v.* Wharton, 11 Ad. and Ell., 934.

[10] See Mulchand *v.* Girdhar, 8 Bom., 6; Kunhya *v.* Bunsee, 1 Agra F. B., 94; Dukhi *v.* Mahomed, I. L. R., 10 Calc., 284, 287.

[1] Hiradi *v.* Gadigi, 6 Mad., 197; Hargopal *v.* Abdul, 9 Bom., 429.

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verbal one, it gives rise to a *new* cause of action[2] *independently* of sec. 19.

The acknowledgment mentioned in art. 180, Act XV, must be *addressed*, or at least *given*, to the person entitled to the decree or order, the right to which is thereby acknowledged.

Whether sealing is signing.

Under sec. 4, Act XIV of 1859, it was held by Mr. Justice Macpherson, of the Calcutta High Court, that *sealing* was not *signing*, at least where there was no evidence that the debtor, in affixing his seal, meant it to be considered as his signature.[3] An illustration under sec. 20, Act IX of 1871, declared, that an acknowledgment written and sealed, but not signed by the debtor, was insufficient under that section. This illustration is omitted in Act XV of 1877. In a case[4] decided in 1878, under Act IX of 1871, Mr. Justice Jackson observed: "It has been stated by Mr. Justice Macpherson, in the case mentioned above, that a sealing is not a signing. That, no doubt, is so in European countries, but it appears to me that it would be dangerous, as well as unfair, to apply absolutely to people of this country the rule which prevails in England upon a matter of this kind. We cannot put out of sight the habits and usages of the people of this country, and there can be no doubt that in regard to a great number of persons, particularly persons who are unable to write, as *purda nusheen* ladies usually are (specially among Mahomedans), the affixing of a seal is regarded and understood by them as being a signature. The distinction between signing and sealing is not known to such persons." No reference was made in this case to the illustration under sec. 20 of Act IX of 1871. But as the illustration has been omitted in the present Act, it is clear that affixing a seal to an acknowledgment *by way of signature* is a sufficient signature within the meaning of the present Act.

Marking is signing.

It has been held that the mark of a marksman is a sufficient signature.[5] A signature, it seems, may be so signed

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[2] *Ibid.* See also Palee Ram *v.* Musst. Jankee, 1 Shome's Report, p. 37; Nand Ram *v.* Ram Prasad, I. L. R., 2 All., 641; and Dukhi *v.* Mahomed, I. L. R., 10 Calc., 284, 291.

[3] Ramzan *v.* Luchman, 8 W. R., 512.

[4] Syud Mahomed Ali *v.* Mirza Dilwar Hossain, 2 Shome's Report, p. 135. Though sealing with a seal of the sort in vogue in England may be a very different thing from signing, sealing with an Indian zemindar's seal may be one mode of signing the name. See Rivaz, 3rd Ed., p. 64.

[5] Bheemongowda *v.* Eeranah, 7 Mad., 358. This case was decided under Act IX of 1871, but as Act XV is by no means more strict in this respect, the ruling applies to cases of acknowledgments under the present law. Where there is nothing to show that a particular mark

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by an agent under the immediate direction and supervision of the principal as to be in effect the signature of the principal, specially where the latter is incapacitated by illness or otherwise from signing himself.[6] Anything which appears to have been *intended* by the writer to be equivalent to a signature would seem to be sufficient—such as, stamping or printing his name instead of writing it, or putting his initials only instead of his full name. (See Brown on Limitation, p. 584; and *Mohesh Lall* v. *Bussunt Kumary*, I. L. R., 6 Calc., 340, 345). A *pencilled* signature may be sufficient.[7]

What amounts to a signature.

It is not necessary that the acknowledgment should be signed at the foot or end.[8] Signature at the top is one of the usual modes of signing in this country.[9] As long as the document is signed with the debtor's name by himself or by his duly authorized agent, in such a way as to make it appear that the acknowledgment is his, and that he is the real author of the writing, it matters not what the form of the instrument is, or in what part of it the signature occurs.[10] Where, however, the contents of the paper are divisible, and the signature is placed under or opposite one portion only, the question whether it applies to all or only to that one portion, is purely one of intention.[1] Where a writing is not *regularly* signed,

The signature may appear in *any* part of the writing.

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is a mark *made* by the maker of the acknowledgment *in lieu of* a signature, it is not sufficient (Bengal I. Company *v.* Koylas Chunder, 10 W. R., 293). Under sec. 2 of the Code of Civil Procedure, 1882, "signed" includes *marked* when the person making the mark is unable to write his name: it also includes *stamped with the name of the person referred to.* In Madabhusi *v.* Singara (I. L. R., 7 Mad., 55) and Ellapa *v.* Annamalai (*Ibid.*, 76) an endorsement *not* in the *handwriting* of the debtor, but with his *mark* under it, was treated as an endorsement in his handwriting.

Marking and stamping.

[6] Banning, p. 118; 11 Ir. L. R., 8. See also the express provisions of sec. 50 of the Indian Succession Act, X of 1865.

If the maker of the acknowledgment is illiterate, it may, under certain circumstances, be presumed that he authorized another to sign his name. Rivaz, 3rd Ed., p. 65. When a third party writes the name of the maker at his request, he makes that third party his agent. Hem Chand *v.* Vohara, I. L. R., 7 Bom., 515.

[7] Geary *v.* Physics, 5 B. & C., 234. A signature *without* any *name* may be valid. Guuee *v.* Sreegopal, 8 W. R., 395.

[8] Khwaja Muhammad *v.* Venkatarayar, 2 Mad., 79, 81.

[9] Andarji *v.* Dulobh, I. L. R., 5 Bom., 88; Jekisan *v.* Bhowsar, I. L. R., 5 Bom., 89.

[10] Mohesh Lall *v.* Sumpat Koeri, 7 C. L. R., 121, 134; (S. C.), I. L. R., 6 Calc., 340, 352; Mahalakshmibai *v.* Nageshwar, I. L. R., 10 Bom., 71. It must be shewn that the name was introduced into the writing with a view to authenticate it. See Mathura *v.* Babu Lal, I. L. R., 1 All., 683, 686.

[1] Brown, p. 586.

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there is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned, because he refused to complete it.

Instances of irregular signatures.

Where the whole of an account stated was written by a debtor himself with the introduction of his name at the top of the entry, the statement was held[2] to be sufficiently signed within the meaning of Act XV of 1877, sec. 19. A letter in the handwriting of the debtor's agent (in answer to an application by the creditor for a settlement of accounts), commencing with the words "compliments of A. B.," and admitting a debt due to the creditor, is an acknowledgment signed within the meaning of the law, although it is not *formally* signed by A. B., or his agent. It seems that the acknowledgment is quite effectually signed whether it runs thus:—"Dear Sir,—I beg to acknowledge the correctness of your account. Yours A. B."; or thus:—"A. B. presents his compliments to C. D., and begs to acknowledge the correctness of his account."

Agent's signature of his own name sufficient.

And as to the name of the principal being written by the agent, it seems clear that if the agent is authorized to write the letter, it matters not whether he signs the name of the principal or his own name.[3]

What acknowledgments should be stamped.

Besides being *written* and *signed*, some acknowledgments must be *stamped*, and it has been held some must be *registered*.

Under Act XVIII of 1869, Sched. II, cl. 5, one anna was the proper stamp-duty for a "note or memorandum written in any book, or written on a separate paper, whereby any *account*, *debt* or *demand*, or any part of any account, debt or demand therein specified, and amounting to twenty rupees or upwards, is *expressed* to have been *balanced*, or is *acknowledged* to be *due*."

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[2] Jekisen *v.* Bhowsar, I. L. R., 5 Bom., 89. Even in England, where a whole document is in the handwriting of a person, his name at the top is a sufficient signature. Banning, p. 58. But the entry of defendant's name in one column taken in connection with a cross in another column does not prove a valid mark or signature. Bengal I. Company *v.* Koylas Chunder, 10 W. R., 293.

[3] Mohesh Lall *v.* Bussant Koeri, 7 C. L. R., 121, 134; I. L. R., 6 Calc., 340.

In Hem Chand *v.* Vohara (I. L. R., 7 Bom., 515), the following was considered a sufficiently signed acknowledgment:

"Written by A. B.—to wit. Rs. 26 are due as stated above, dated 14th Choitra 1936. In the handwriting of C. D." In this case it was proved that as A. B. could not write, he got the acknowledgment, including his name, written by C. D.

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Under the present Stamp Act (I of 1879), Sched. I, cl. 1, one anna is the proper stamp-duty for an "acknowledgment of a *debt* exceeding *twenty* rupees in amount or value, written or signed by or on behalf of a debtor, *in order to supply evidence of such debt* in any book (other than a banker's pass-book) or on a separate piece of paper, when such book or paper is left in the *creditor's possession*."

Provisions of Stamp Act.

It was held under the Stamp Act of 1869 that a writing on a one-anna stamp, acknowledging a balance of account due to the plaintiff, with the addition of the words "to be paid next January 1878," although not admissible in evidence as a *promissory note* in proof of a promise to pay, by reason of its being insufficiently stamped, was admissible, on the stamp which it bore, as a memorandum in proof of an *acknowledgment* of a debt.[4] According to several rulings of the Calcutta High Court, an unstamped acknowledgment of debt (or other document), if received in the Court of first instance, cannot be objected to on appeal.[5] Acknowledgments of liability in respect of *other* rights were not required to be stamped under the Stamp Act of 1869. And now, even acknowledgments of *debts* are required to be stamped, only when they are written *in order to supply evidence of such debt*, not when they are written merely to renew the period of limitation.[6]

Plea of *unstamped* acknowledgment.

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[4] Kanhaya Lal *v.* Stowell, I. L. R., 3 All., 581, F. B. An account having two sides to it, the one headed "amount received" and the other "amount advanced," and comprising entires under *either* head, *or* under *both* heads, is not an acknowledgment of debt within the meaning of the Stamp Act. (Brojo Gobind *v.* Goluck Chunder, I. L. R., 9 Calc., 127). Nor is a *nikash* or balance sheet signed by a gomastha (who is remunerated by a share of the profits of the business) showing a balance due to the owner. (Nundkumar *v.* Shurnomoyee, I. L. R., 15 Calc., 162).

Accounts and *nikashes*.

[5] See Mohesh Lall *v.* Busant, I. L. R., 6 Calc., 340, 346; Khoob *v.* Jungh, I. L. R., 3 Calc., 787. *But* see Safdar Ali *v.* Lachan, I. L. R., 2 All., 554; and Vallapa *v.* Mohammed, I. L. R., 5 Mad., 166.

[6] The question whether or not an allusion to a debt contained in a letter from a debtor to his creditor amounts to an acknowledgment of the debt within the meaning of Art. I, Sch. I, of the Indian Stamp Act, 1879, is a question in each case of the *intention* of the writer. Hence, where such a letter, written *ante litem motam*, before limitation in respect of the debt had expired, and at a time when *other* evidence of the debt was *subsisting*, was tendered in evidence as an acknowledgment of the debt for the *purpose of saving limitation* under the provisions of sec. 19 of the Indian Limitation Act, 1877, it was held that the said letter was not inadmissible in evidence by reason of its not having been stamped. (Bishambar *v.* Nand, I. L. R., 15 All., 56). See Morris *v.* Dixon, 4 A. & E., 845. It should be borne in mind that the Stamp and Registration Acts in force at the time of the execution of written acknowledgments are the Acts which govern their admissibility in evidence. But the question whether an acknowledgment of liability is or is not operative as a bar to limitation depends on

What Stamp, Registration and Limitation Acts applicable.

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What acknowledgments, if any, should be registered.

Acknowledgments of *debts* are not compulsorily registrable. They may or may not be registered. A deed of sale of immoveable property of the value of Rs. 100 or upwards must be registered in order that it may be admissible as evidence of the transfer. But an acknowledgment of a pre-existing debt in such an instrument, even if not registered, is admissible for the purpose of renewing the period of limitation for a suit for the recovery of such a debt.[7]

Acknowledgment of *title* to land.

But defendant's acknowledgments of plaintiff's *title* to immoveable property of the value of Rs. 100 and upwards are, it has been held, declarations of right within the meaning of the section under which registration is compulsory, and that such acknowledgments, if unregistered, are not admissible in evidence, even for the purpose of renewing the period of limitation.[8] But it may be doubted[9] if the acknowledgment of a pre-existing right, where there has been no change of legal relation to the property, is a *declaration* within the purview of the Registration Act. And where a written acknowledgment of liability is made without an *express* admission of the title or right of *any particular* person, as where a record of rights prepared in connection with the settlement of an estate with the defendants, in which they are *described as mortgagees* of the estate, but which does not mention the name of the mortgagor, is attested by the defendants as correct, such acknowledgment may be effective,[10] although it is not registered. A record of rights prepared by a settlement officer is *expressly* exempted from the provisions of the Registration Act;[1] but a similar acknowledgment in *any* unregistered writing is a

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Plea of non-registration.

the Law of Limitation in force at the time of the institution of the suit. (See Mohesh Lall *v.* Busunt, I. L. R., 6 Calc., 340, 349; and Dharma *v.* Govind, I. L. R., 8 Bom., 99). As to whether a plea of *non-registration* may be taken in appeal, regular or special, see Girish Chunder *v.* Srimati Ameme, 3 Beng. L. R. App., 125; Joygopal *v.* Thakomonee, 11 W. R., 381; Besswa *v.* Kalkapa, I. L. R., 2 Bom., 489; Safdar Ali *v.* Lachman, I. L. R., 2 All., 554, 559; Himmat Singh *v.* Sewa Ram, I. L. R., 3 All., 157, 167.

[7] Nund Kishore *v.* Mussamut Ramsookhee, I. L. R., 5 Calc., 215; and Khusalo *v.* Beharilal, I. L. R., 3 All., 523.

[8] Foki *v.* Khotu, I. L. R., 4 Bom., 590.

[9] Mr. Justice West is of opinion that the word "declare" in sec. 17 of the Registration Act, III of 1877, coupled as it is with the words "create," "assign," "limit," or "extinguish," implies a declaration of will by which a *change* of legal relation is effected,—not a mere statement of an *existing* fact—Sakharam *v.* Madan, I. L. R., 5 Bom., 332. It is a *declaration* if the writing itself amounts to a release operating or intended to operate as a declared volition constituting or severing ownership.—*Ibid.*

[10] Daia Chand *v.* Sarfraz, I. L. R., 1 All., 117, F. B.

[1] See sec. 90, Act III of 1877.

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sufficient acknowledgment of the mortgagor's right to redeem[2]—for, it can hardly be contended that such a writing by itself "operates to *declare*" the mortgagor's right to redeem.

Acknowledgments which are invalid on *other* grounds.

An acknowledgment to be valid must also, in *other* respects, comply with the *general* principles of law applicable to the execution of contracts and conveyances, so that an acknowledgment obtained by fraud or duress, or from a person who cannot act for himself, is of no use whatever.

Secondly, under sec. 19, the acknowledgment must be made *within* the period of limitation.

Under the second head, it is only necessary to mention that, although sec. 28 of Act XV extinguishes only the *right to property* (whether moveable or immoveable) at the determination of the period prescribed by that Act for the institution of a suit for *possession* of such property, and although it is clear that the obligation of the debtor to pay his *debt* is *not* extinguished by limitation,[3] it has been expressly provided (see sec. 19 of Act XV and sec. 20 of Act IX) that an acknowledgment, in order that it may renew the period of limitation, must be made *before* the expiration of the prescribed period.[4] The "prescribed period" is the period prescribed by the Act which governs the suit and not the Act which was in force at the time the acknowledgment was signed. (*Mukani* v. *Manan*, I. L. R., 5 Mad., 182). In cases where the right is extinguished, there is no subsisting right which may be acknowledged.[5] But in cases where the *remedy* only is barred, and the *right*

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[2] 3 Atkyn's Report, at p. 114; Stansfield *v.* Hobson, 16 Beav., 236. See I. L. R., 1 All., 123, 125, F. B. But in Thompson *v.* Boyer, 9 Jur., N. S., 863; and Ram Dass *v.* Brijnundun, I. L. R., 9 Calc., 616, it was laid down that an admission that the defendant held under a mortgage title was *not* sufficient. An admission of an existing right to redeem at the date of the acknowledgment is necessary. Under Act XV of 1877, there must be an acknowledgment of *liability* (immediate or deferred) in respect of the property or right claimed by the plaintiff. If an acknowledgment of the mortgagor's title or right is qualified by a statement that that title or right has ceased to exist, the acknowledgment is not sufficient. Opposite authorities as to sufficiency.

[3] See Mohesh Lall *v.* Sumpat Koeri, I. L. R., 6 Calc., 340.

[4] Under Act IX of 1871, this was the period of limitation *prescribed* by *that* Act. (Luvar *v.* Luvar, I. L. R., 5 Bom., 688). The language of sec. 19, Act XV, is more general, and *includes* cases for which a period of limitation is prescribed by *local* or *special* laws. (Parbuttinath *v.* Tejmoy, I. L. R., 5 Calc., 303).

[5] A written acknowledgment, *after* that period, by the person in possession of the property, will *not* restore the title which has been extinguished by the statute. (Sandars *v.* Sandars, 19 Ch. D., 373. See Lecture XI). Such an acknowledgment, however, may be used as *evidence* against the person making the acknowledgment, to prove, for instance, that he was acting as the plaintiff's agent, and not holding the property adversely to the plaintiff. (See Doe *v.* Beckett, 4 Q. B., 601; Lyell *v.* Kennedy, 14 App. Cas., 437, and note 10, *infra*). Effect of acknowledgment after extinction of right.

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Provisions of the Contract Act as to barred debts.

is left *in esse*, it is not necessary, in England, that the acknowledgment should be made before time has finally run in favor of the maker.[6] It may be observed that the most important suits (besides suits for possession of property) to which the doctrine of reviving a remedy[7] *barred* by limitation, might apply, *viz.*, suits for debts and liquidated amounts, are sufficiently provided for by cl. 3, sec. 25, Act IX of 1872. (See *Chatur* v. *Tulsi*, I. L. R., 2 Bom., 230). If the written acknowledgment of liability amounts to a *promise* to pay, and it very often does so, a suit may be brought upon the promise as a fresh and an independent cause of action, although there is no consideration for the promise, except the debt which has been already barred (but not extinguished) by limitation. And although the principle of this provision of the Contract Act, IX of 1872, is not altogether new to our Courts,[8] it was not *expressly* recognized by the Legislature until about the time when Act IX of 1871 (which introduced this requisite of an acknowledgment) came into operation.[9]

If a suit is *barred* at the date of its institution, an acknowledgment made *after* the institution can be of no use under sec. 19, Act XV.[10]

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[6] Banning, p. 38. The law of British India *was* the same under sec. 4, Act XIV of 1859. See p. 275, *supra*.

Acknowledgment of breaches of contracts and torts.

[7] In England, the *common law* "doctrine of acknowledgment" applies only to cases founded upon *assumpsit*. If the gist of an action is the *injury* committed by the defendant, and the right of action is once barred by time, it is impossible to revive it by admission of indebtedness; and in the case of *torts* no acknowledgments will suffice to avoid the express words of the statute of James I." (See Banning, p. 40). An acknowledgment cannot *revive* the remedy where the cause of action is either a tort or a breach of a contract to do or to omit to do some *act*. "Where, upon such a breach the damages are not liable to be assessed, but a definite sum can, by stipulation between the parties, be recovered as *liquidated damages*, the following distinction appears to arise, *viz.*, that a mere *acknowledgment of the breach* can have no effect, but an acknowledgment of the stipulated sum being due takes the case out of the statute."—Darby and Bosanquet, p. 68. See p. 275. Before the enactment of the Indian Contract Act, IX of 1872, even a *verbal* promise to pay a barred debt was sufficient to give a new cause of action. (Katoppa *v.* Somauna, 6 Mad., 51). Now, the *promise* must be in *writing*. What is very often *called* an "account stated" may amount to an *acknowledgment*, but not to a *promise* in writing. (Ramji v. Dharma, I. L. R., 6 Bom., 683; Ranchoddas v. Jeychand, I. L. R., 8 Bom., 405).

[8] Under sec. 4, Act XIV of 1859, which governed suits instituted before the 1st April 1873, an acknowledgment made *after* the period of limitation revived the remedy on the original cause of action. See p. 275, *supra*.

[9] The question whether an admission in the defendant's *written statement* was a sufficient acknowledgment under sec. 4, Act XIV of

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It has been already remarked that Art. 180, Sched. II, Act XV (like Art. 169 of Act IX of 1871), *omits* to mention that an acknowledgment of the right to money secured by certain decrees or orders should be made *before* the expiration of the period prescribed for enforcing such decrees or orders. And as sec. 19 of Act XV does not say[1] that "*no* acknowledgment shall take the case out of the operation of this Act unless such acknowledgment is made before the expiration of the prescribed period," it may be fairly contended that an acknowledgment under Art. 180 (in respect of a decree of a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or of an order of Her Majesty in Council) is an effectual acknowledgment even when it is made *after* the expiry of the prescribed period of limitation.[2] But the validity of this contention has not been admitted in any reported case that I know of.[3] It may be observed that the language of the proviso is very similar to the language used in sec. 40 of 3 and 4 Will. IV, c. 27, the only important difference being that the English statute (like sec. 19, Act XIV) requires that the acknowledgment should be made "in the meantime," and that, in two cases at least, it was the opinion of the Court that an acknowledgment made *after* the expiry of the

Perhaps otherwise, under Art. 180, Sched. II.

1859, was raised but not decided in Nijamudin *v.* Mahomed Ali, 4 Mad., 385. *Since* the passing of Act IX of 1871, the acknowledgment must be made *before* the suit is *barred* by limitation, and the Courts are *bound* to dismiss a *barred* suit even if the defendant *confesses* judgment. But see notes under sec. 4, Act XV. In a suit for the recovery of *property*, the written statement of the defendant may, even now, show that his possession of the property has not been adverse to the plaintiff, and thus save the suit from the operation of limitation.

Acknowledgment in written statement of defendant.

[1] Section 20 of Act IX of 1871 *did* say so, and if the acknowledgment of a *judgment-debt* was an acknowledgment within the meaning of that section, there was some reason for omitting the words "before the expiration of the prescribed period" in the proviso to Art. 169 of Sched. II of that Act. In the corresponding provision of Act XIV (*viz.*, in sec. 19) the words "in the meantime" did duty for the words "before the expiration of the prescribed period." If an acknowledgment under Art. 180, Act XV, may be made, *after* the prescribed period, we arrive at this curious result, that while an *ordinary* debt, even when barred, could be *revived* by an acknowledgment under Act XIV, a *judgment*-debt in a Court established by Royal Charter, in the exercise of its ordinary original jurisdiction, could *not* be so *revived*; and while an ordinary debt, if barred, *cannot* be revived by an acknowledgment under Act XV, a judgment-debt in a Court established by Royal Charter, &c., *may be* so revived.

[2] It may be said, on the other hand, that under sec. 4, Act XV, Art. 180 must be read subject to the provisions of secs. 19 and 20.

[3] The question was raised in Purmanund Dass *v.* Vallab Dass, I. L. R., 11 Bom., 506, but the Court did not decide it. (See p. 513, *Ibid.*)

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prescribed period would have no effect (under sec. 40) in reviving the right to recover.[4] The *omission* of the words "in the meantime" in the corresponding article of Act XV is therefore significant.

The same remarks apply to *payments* under Art. 180.

Thirdly, what is, in terms, a sufficient acknowledgment.

Thirdly, an acknowledgment under sec. 19, Act XV, must be an acknowledgment of *liability* in respect of *the property or right* which is claimed in the suit or application. It is not necessary that the writing containing the acknowledgment should be *dated*, or that it should *specify* the *exact nature* of such property or right. The *name* of the person *entitled* to the property or right, also, need not appear on the face of the writing (see p. 281, *supra*). An acknowledgment is sufficient even if the maker avers that the time for payment, delivery, performance, or enjoyment has not yet come.[5] An admission that a sum of money will be payable on the happening of an event, *future and uncertain*, was held to be insufficient under Act XIV of 1859,[5] and will probably be insufficient under the present law. So an admission by the debtor that he executed the bond on which the suit is afterwards brought, is not sufficient, if the admission is coupled with an explanation that the bond has been superseded by a subsequent transaction. The explanation shews that the debtor does *not* acknowledge a *subsisting liability*.[6a] But an *admission of liability*, coupled with an offer to pay, deliver, perform, or permit to enjoy, at some future time, or as soon as practicable,[7] is sufficient. Such an offer need not be

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[4] See Darby and Bosanquet, p. 160; Gregson *v.* Hindley, 10 *Jur.*, 383; and Homan *v.* Andrews, 1 Ir. Ch. R., 106.

An acknowledgment of liability under a decree of any of the Courts *not* established by *Royal Charter* if made *after* the prescribed period is of no effect under sec. 19, Act XV. (Shibdut *v.* Kalka Persad, I. L. R., 2 All., 443).

[5] Act XV of 1877, sec. 19, expl. 1; Young *v.* Mangalapilly, 3 Mad., 308; see p. 282, *supra*.

[6] Young *v.* Mangalapilly, 3 Mad., 308.

[6a] Ramdas *v.* Birjnundun, I. L. R., 9 Calc., 616. See also 3 Mad. L. Journal, 35, at p. 43. An "acknowledgment of *liability*," however qualified, must *always* be an acknowledgment of an *existing* or *subsisting* liability. (See p. 282, *supra*).

Acknowledgment marked "without prejudice."

[7] Woomesh *v.* Eliza, 12 W. R., O. A., 2, see pp. 277, *supra*, and 297 *infra*. It has been held in England that the insertion of such words as "without prejudice" or the like, in a letter written by the debtor may invalidate an acknowledgment. If any terms are offered for settlement and they are *not accepted* by the creditor, the letter is inadmissible to prove the *new promise*. (*In re* River Steamer Co., L. R., 6 Ch., 822). But a written *acknowledgment* is not inadmissible simply because the letter or document containing the acknowledgment is marked "without prejudice." If *no terms* are offered by the debtor for the

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taken into consideration in a suit on the *original* cause of action.

Conscious admission necessary.

The person making the acknowledgment must *consciously* admit, either by express words or by necessary implication, that there is an *existing* liability in respect of *the identical* right which is afterwards claimed by the plaintiff.*

Instances of sufficient and insufficient acknowledgments.

The *present* received doctrine as to the theory of acknowledgments according to the *common law* of England*,—namely, that an acknowledgment to be effectual must (directly or indirectly, expressly or impliedly) amount to a *promise* to pay,—has never been adopted by the Indian Legislature. Under the *old* doctrine, whatever repelled the presumption of payment or satisfaction was a sufficient acknowledgment (at common law), so that even if the admission were accompanied by a refusal to pay, or a claim of the benefit of the statute of limitation, the case was still held to be taken out of the statute.** Under the law of British India (as well as under the 3 and 4 Will. IV, chapter 27, sec. 14, and chapter 42, sec. 5, in England) a promise or the implication of a promise is not necessary; and it is expressly laid down by the Indian Act that an acknowledgment of liability, though addressed to a *third* party, and though accompanied by a *refusal* to satisfy the obligation, is sufficient for the purpose of renewing the period of limitation. Thus acknowledgments in the following terms† are sufficient: "I know that I owe the money, but the bill I gave is unstamped or insufficiently stamped, and I will never pay it." "I cannot afford to pay my new debts, much less the old debt due to you." An expression of "hope" that the debtor will satisfy his debt to the plaintiff or the

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settlement of any dispute with the creditor, or if any such terms are offered and they are *accepted* by the creditor, the letter or document *is admissible*. (See *In re* Daintrey, 1893, 2 Q. B., 116).

* Venkatarasmanyya *v.* Srinivas, I. L. R., 6 Mad., 182; Dharma *v.* Govind, I. L. R., 8 Bom., 99; Ram Das *v.* Brija, I. L. R., 9 Calc., 616. Not merely *a* liability, but *the* liability, or that out of which it arises, must be pointed to with reasonable certainty. (Bradshaw's Digest of the printed but unreported judgments of the Bombay High Court, p. 203). For two cases which to a certain extent *modify* this rule, see note (1), p. 295, *infra*.

Admission of identical right.

* See Banning, p. 41; Tanner *v.* Smart, 6 Barn. & Cr., 603; Gopee Kisben *v.* Bindaboun, 12 W. R., P. C., 36; and pp. 276-278, *supra*.

** Darby and Bosanquet, p. 46.

† Such acknowledgments are *insufficient* in cases under 21 James I, c. 16, which makes no (statutory) exception in favor of acknowledgments. See A'court *v.* Cross, 3 Bing., 329; Banning, pp. 42 and 50. The Indian law is *wider* than the English common law rule. (See Uncovenanted S. Bank *v.* Grant, I. L. R., 10 All., 93; Nijamudin *v.* Mohammed, 4 Mad., 385). An acknowledgment addressed to a *third* party cannot amount to a *promise* (to the creditor) to pay on request.

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person through whom the plaintiff claims is sufficient according to the Indian law. Under the English common law doctrine, the *hope* must be accompanied by such an acknowledgment of the debt as is sufficient to raise the inference of a *promise* to pay on request."

Instances of sufficient and insufficient acknowledgments.

The following letter to an agent of the creditor was considered by the Allahabad High Court[a] to contain an unqualified admission of a subsisting debt under sec. 20 of Act IX of 1871: "With regard to your communication anent promissory notes given by me to Mr. S., and which I have not paid, I must only say that Mr. S. must trust to my integrity to pay him, and as soon as I have cleared off a couple of decrees against me I will commence paying him; but if you put the matter into Court, I must only plead want of consideration, and throw Mr. S. back on the original decree which had lapsed some three years before I wrote the promissory notes." As Act XV is by no means more strict than Act IX in this respect, the above is, of course, a sufficient acknowledgment of liability within the meaning of sec. 19, Act XV. But where the debtor admitting the making of a promissory note, *wholly* repudiates his liability in respect thereof, the admission is not an acknowledgment of liability.[b] If the debtor couples his admission with the allegation that he has paid the debt, or that the debt is barred by limitation, and that he is *no longer liable to pay* it, the creditor cannot, it is apprehended, take advantage of the admission, even if he proves that the allegation of payment or of the bar of limitation is incorrect.

A letter containing no admission of a liability, or the justice of a demand, but only doubtful expressions, is not sufficient.[c] Thus, if a debtor writes,[d] "if I have to *stump up* (*i.e.*, pay your reckoning), the sooner it is done the better, though it would go against all my ideas of justice and right,"—the writing is insufficient as an acknowledgment.

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[a] Sidwell *v.* Mason, 2 H. & N., 310; Banning, 49.

[b] See Narbada *v.* Rughoonath, 2 Bom., 349. This case was decided under Bombay Reg. V of 1827.

[c] Gash *v.* McLean, 2 N. W. P. H. C. Rep., 403. An acknowledgment of "*obligations once received*" is not an acknowledgment that a *debt is due*. Rogers *v.* Montriou, 6 B. L. R., 550, 553.

[d] The Uncovenanted Service Bank *v.* Marshall, 6 N. W. P. H. C. Rep., 366. It was probably on this ground that a letter from the Commissioner of Revenue, expressing his willingness to *recommend* the Government to pay compensation for land taken by Government from the plaintiff's estate, was held to be no acknowledgment of plaintiff's right to compensation. (Hills *v.* The Government, 11 W. R., 1). Is a suit for *compensation* a suit for a debt within the meaning of Act XIV, section 4?

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A "remittance of £40 to old account" does not necessarily show that the debtor is liable to pay any more. These words do not amount to a sufficient acknowledgment of liability.[7] So again, the words "I do not wish to avail myself of the Statute of Limitation," or the words "I hereby debar myself of all future plea of the statute," do not, by themselves, show that the debtor does not intend to defend the action upon its *merits*, and are therefore insufficient as an acknowledgment of liability.[8]

Instances of sufficient and insufficient acknowledgments.

Although it is true, that "a debtor's petition stating that the decree-holder has executed the decree against him, and got his property attached, and that a day has been fixed for the sale, and praying that two months' time may be sanctioned, and, the attachment subsisting, the 8th February next may be fixed for the sale," does *not* contain *any* admission that the decree could be legally executed against the debtor, and cannot be treated as an estoppel,[9] it has been held that the judgment-debtor's petition to postpone a sale of his property in which he *expressed his willingness* of making some private arrangement for *paying off the debt* is a sufficient acknowledgment of liability within the meaning of sec. 19, Act XV of 1877.[10]

It is not necessary that the writing should specify the *exact* amount of the debt or legacy, or the *exact* nature of the property or right, in respect of which the acknowledgment is made; but there must be some acknowledgment of the existence of a liability arising out of *the particular* cause of action on which the suit is afterwards brought.[1] The words "I shall be obliged to you to send in your account made up to Christmas last," have been

The liability acknowledged must be in respect of the *particular* claim of *the plaintiff*. But the *exact* amount or nature of the liability need not be *specified*.

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[7] Shearman *v.* Fleming, 5 B. L. R., 619.

[8] Such doubtful expressions of admission are also insufficient under the English law. See Banning, pp. 51 and 52.

[9] Mina *v.* Juggut, 13 C. L. R., 385, 391, P. C.

[10] Ramhit *v.* Satgur, I. L. R., 3 All., 247; Ramcoomar *v.* Jakur, I. L. R., 8 Cal., 716; Toree Mahomed *v.* Mahomed, I. L. R., 9 Cal., 730; Vinkatarao *v.* Bijising, I. L. R., 10 Bom., 108; but cf. Rama Raw *v.* Venkatasa, I. L. R., 5 Mad., 171.

[1] Narrayanapa *v.* Vaskar, 7 Bom., 125; see also Venkataramanayya *v.* Srinivas, I. L. R., 6 Mad., 182; Dharma *v.* Govind, I. L. R., 8 Bom., 99. The acknowledgment must point with reasonable certainty, not merely to *a* liability, but *the* liability or that out of which it arises (see Branson's Digest of unreported printed judgments of the Bombay High Court, Column 203). But it has been held that an acknowledgment of liability *as a surety only* is sufficient to keep alive a liability as a *principal* debtor. (Uncovenanted S. Bank *v.* Grant, I. L. R., 10 All., 93), and that an acknowledgment of liability under a dishonored *bill* is an acknowledgment of the original *debt* for which the bill was given. (Baman *v.* Vairavan, I. L. R., 7 Mad., 392).

Modifications of the rule as to *identity* of right acknowledged.

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considered to be a sufficient acknowledgment of liability.[1a] The debt or liability acknowledged by the maker must be shown, either by the writing or by parol evidence, to refer to the particular claim or claims which the plaintiff makes in the suit.[2] If there is more than one debt due to the plaintiff, and the defendant acknowledges one, parol evidence is admissible for the purpose of showing that the acknowledgment relates to the debt for which the suit is brought.[3] Where there are several debts, and the defendant merely writes to ask the plaintiff to come and take what is due to him, if it is impossible for the plaintiff to prove that the debt referred to is any *other* than the one which the defendant subsequently chooses to admit in his statement, the acknowledgment of liability is *practically* ineffectual.[4]

Where there are *several* debts.

Exact amount of debt need not be specified.

In many cases (specially where there is a single debt or a single cause of action) an acknowledgment would be binding though the amount due has not been ascertained at the time.[5] Where a letter, admitting liability, states that the account rendered by the creditor is on the face of it correct, but that the writer reserves to himself the right of testing the account by his own books before finally allowing it to be correct, there is an acknowledgment which is sufficient for the purpose of renewing the period of limitation.[6] An admission of the debt is sufficient, although the exact amount payable is disputed or remains to be proved.[7] A letter acknowledging a debt due but asking for the exact amount is sufficient.[8] But where a *definite* sum, smaller than the amount claimed, is named in the

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[1a] Quincey *v.* Sharpe, L. R. 1 Ex. D., 72. So also the words "I am ashamed the account has stood so long." See Curwen *v.* Milburn, 42 Ch. D., 424.

[2] An acknowledgment that *a debt* is still due to *somebody* is not sufficient. Though not *addressed to* the plaintiff, or the person through whom he claims, the acknowledgment must contain a distinct admission of *liability* to pay the debt *to* the plaintiff or the person through whom he claims. Parsaud Dass *v.* Dinonath, 2 Hyde, 14, as explained in Nijamudin *v.* Mohammad, 4 Mad., 385, at pp. 391 and 392. See also Mylapore *v.* Yeo, I. L. R., 14 Calc., 801, P. C.

[3] See Woomesh *v.* Eliza, 12 W. R., O. A., 2.

[4] Nobin *v.* Kenny, 5 W. R., S. C. Ct. Ref., 3, as explained in Pearee *v.* Woomesh, 9 W. R., 140.

[5] Pearee *v.* Woomesh, 9 W. R., 140.

[6] Mothura *v.* Babu Lal, I. L. R., 1 All., 683.

[7] Colledge *v.* Horn, 3 Bing., 119; Banning, pp. 45, 53; see also Harrison *v.* Hope, 9 B. L. R., App., 43; Mohesh *v.* Bussunt, I. L. R., 6 Calc., 340, 353; and Skeet *v.* Lindsay, 2 Ex. D., 314.

[8] Rendell *v.* Carpenter, 2 Y. and J., 484; I. L. R., 6 Calc., p. 343; and Darby and Bosanquet, p. 49.

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written acknowledgment, and parol evidence cannot be given to show that a larger amount was meant to be admitted by the debtor, the acknowledgment, it is apprehended, cannot take out of the statute the *whole* amount claimed by the creditor.[9]

Admission of a *definite* smaller debt.

If a debtor accompanies his acknowledgment with a promise to pay upon any condition, it is not necessary[10] under the Indian law to prove the fulfilment of the condition, unless the suit is brought on the promise as a *fresh* cause of action. The acknowledgment of liability, within the prescribed period, is sufficient to renew the period of limitation on the *original* cause of action.

Admission coupled with a conditional promise.

Act XV does not, as Act IX did, require an unqualified admission of liability. The following letter, it is apprehended, contains a sufficient acknowledgment of liability: "I have received a letter from your solicitors, requesting me to pay you an account of £40. I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1875; but as you declare it was not settled, I am willing to pay you by instalments. Should the proposal meet with your approbation, we can make arrangements accordingly."[1] The creditor is not legally bound to give time for payment by instalments, although he relies on an *acknowledgment* which asks for time to pay.[2] It is not necessary that the creditor should assent to the terms of an *acknowledgment* before he takes advantage of it.[3]

Qualified admissions.

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[9] Darby and Bosanquet, p. 61; see Venkataramana *v.* Srinivas, I. L. R., 6 Mad., 182. An acknowledgment that a *part* of a debt was due was sufficient under the express provisions of sec. 4, Act XIV of 1859.

[10] See Mohesh *v.* Bussunt, I. L. R., 6 Calc., 340, 345, 353. It is otherwise under the English common law, see Banning, p. 47. See pp. 276, 278, and 293, *supra*. Even in British India, when the defendant, *after* his debt had become *barred*, made a conditional promise to pay, *viz.*, when he was able, it was held that, the plaintiff having failed to prove the defendant's ability to pay, the *promise* did not operate and the plaintiff could not recover. Watson *v.* Yates, I. L. R., 11 Bom., 580.

[1] See Banning, p. 46, In England, proof of the creditor's assent is *necessary* to make such an acknowledgment amount to a *promise* which is required by the common law in cases of simple contracts.

[2] Pearee *v.* Woomesh, 9 W. R., 140, 141. The following words in a letter from the defendant were considered sufficient to constitute a valid acknowledgment of a debt: "I cannot prevent you from suing me, but I should be much obliged if you would give a little longer delay before doing so." Harrison *v.* Hope, 9 B. L. R., Appendix, 43.

[3] Offering to pay the creditor by instalments, and praying to be excused from the payment of interest, is a sufficient acknowledgment

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If a debtor acknowledges, in writing, the *creditor's right* to have the accounts taken, and his own *liability* to pay any balance that may be found due, the acknowledgment is sufficient, though the debtor *qualifies* his admission by maintaining that no balance is really due by him.[4]

Advertisement to bring in claims.

An illustration under sec. 20, Act IX, expressly laid down that an advertisement to creditors merely to bring in their claims had no operation as an acknowledgment, and there can be little doubt that the law is still the same.[5] It may, however, be otherwise, if the advertisement contains a promise to pay on application all persons who have debts owing to them by the advertiser.[6]

If an executor registers a creditor's claim, and promises to give notice when the assets of the testator, if any, will be distributed, the registry and the promise do not amount to a sufficient acknowledgment that a debt is due.[7]

Requisites of sufficiency.

As a general rule, it may be laid down that an acknowledgment under sec. 19 of Act XV must amount to such a clear *admission of an existing liability* as would renovate the liability at the time of such acknowledgment. The admission must be made in writing, either by *express words* or by *necessary implication* from the words used,[8] and the maker must be *conscious*[9] that he is admitting by such writing a liability, in respect of the *identical*[10] right which is claimed. (See p. 292, *supra*).

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of debt, irrespective of the debtor's assent. (Shah Mukkum *v.* Nawab Imtiazoodowlah, 5 W. R., P. C., 18). In Laljee *v.* Raghoonondon, I. L. R., 6 Calc., 447, the plaintiff relied upon a written acknowledgment to which he was no party, and although he had never before openly assented to the amount acknowledged, it was held that he was entitled to a decree for the amount, so long as the acknowledgment remained uncontradicted and unexplained by the debtor.

[4] Sitayya *v.* Rangareddi, I. L. R., 10 Mad., 259, 265; Prance *v.* Sympson, Kay, 678.

[5] See Darby and Bosanquet, p. 67. Sending in a claim to an executor or administrator is not equivalent to bringing an action, nor does it even with the advertisement to bring in claims, amount to an acknowledgment. (Warburton *v.* Stephens, 43 Ch. D., 39).

[6] See Banning, p. 275; Andrews *v.* Brown, Prec. in Ch., 335.

[7] Icvara Das *v.* Richardson, 2 Mad., 84.

[8] For instances of *implication*, see Ramcoomar *v.* Jakur, I. L. R., 8 Calc., 716, 718; Daiachand *v.* Sarfraz, I. L. R., 1 All., 117; Sitayya *v.* Rangareddi, I. L. R., 10 Mad., 259, 265.

See Dharma *v.* Govind, I. L. R., 8 Bom., 99.

[10] Venkataramana *v.* Srinivas, I. L. R., 6 Mad., 182. For some qualification of this rule, see note 1, p. 295, *supra*.

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If a debtor's letter[1] to the creditor contains only the following words,—"send any demand you have; *if just*, I will not trouble you,"—the letter, it is apprehended, is not a *written* acknowledgment of *liability*, though it may be proved *aliunde* that the demand is a just one. But the admission of a liability, coupled with a claim to a set-off, does not render the admission less effectual.[2] Instances of insufficiency.

Where a mortgagee *as such* obtained possession of the mortgaged property in execution of a decree against the mortgagor, and filed a receipt in Court, in which he acknowledged having received possession as directed by the decree, it was held,[3] that the reference to the decree was merely a means of defining the property delivered, and not to the contents of the whole decree; that to suppose that the writer of the receipt thereby admitted the mortgagor's title would be "to go beyond what probably was present at all to his *consciousness*" at the time he gave the receipt; and that therefore the receipt, notwithstanding the reference to the decree, was insufficient as an acknowledgment of the right of redemption under sec. 19, Act XV of 1877.

As a general rule, the question what terms are sufficient to constitute a binding acknowledgment, is a question of *law* which it is for the Court to decide.[4] Sufficiency, a question of law.

There is nothing in sec. 19 to restrict its operation to acknowledgments of any particular classes of rights. A right to compensation, even in a case of tort,[4a] or a right to enforce a judgment or decree,[5] is, it is apprehended, a right within Rights of any kind may be acknowledged under Act XV.

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[1] Darby and Bosanquet, p. 51. Such a letter is also insufficient under English law; but an offer on the part of the defendant to settle accounts, though claiming balance as due to him, is sufficient. The words "I beg of you to send in your account" addressed by the debtor to the creditor are a sufficient acknowledgment of liability. Quincey *v.* Sharpe, 1 Ex. Div., 72; cf. Doya Narain *v.* Secretary of State, I. L. R., 14 Calc., 256.

[2] Explanation, sec. 19, Act XV; Darby and Bosanquet, p. 61.

[3] Dharma *v.* Govind, I. L. R., 8 Bom., 99, 102.

[4] Morrell *v.* Frith, 3 M. & W., 402; Banning, 2nd Ed., 129.

[4a] For the English law on the subject, see p. 290 (note), *supra*.

[5] The Privy Council considers a right to enforce a decree a vested *right*, which should not be retrospectively affected by a new law. (Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47, 56). And the Calcutta, Bombay, and Allahabad High Courts consider sec. 19, Act XV, applicable to acknowledgments of rights to enforce decrees. (See Ramcoomar *v.* Jakur, I. L. R., 8 Calc., 716; and Ramhit *v.* Satgur, I. L. R., 3 All., 247, F. B.; Venkatarao *v.* Bijising, I. L. R., 10 Bom., 108). But the Madras High Court thinks "it would be productive of the greatest inconvenience (if it indeed were possible) to apply the provisions of sec. 19 to applications made in the course of suits or proceedings." According to this view, an acknowledgment of the existence of a judgment-debt, or of a right to apply for a review of Does sec. 19 apply to applications in the *course* of suits or proceedings?

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the meaning of the section. An acknowledgment of a claim to immoveable property will operate to keep alive such a claim.

Fourthly, who must make the acknowledgment.

Under the fourth head, sec. 19, Act XV, requires that the acknowledgment must be signed (that is, made) by the party against whom any property or right is claimed, or by some person through whom he derives title or liability, or by a duly authorized agent of such party or person.

Infants and their guardians cannot.

It is settled law in England that as an infant is capable of contracting a debt for *necessaries* he is also capable of acknowledging *such* a debt. (Darby and Bosanquet, p. 66). But under secs. 10 and 66 of the Indian Contract Act an infant cannot render himself personally liable *even* by a so-called contract for necessaries; and as an acknowledgment virtually re-creates the original liability, it is apprehended that an infant, or a person who is otherwise incompetent to contract, cannot make a valid acknowledgment of liability. However, as the guardian of an infant and the committee of a lunatic represent their wards, and as they are not accountable for honestly paying barred debts,[s] it may be contended that an acknowledgment by the guardian or the committee is an acknowledgment by the infant or the lunatic. But, according to the terms of the section, an acknowledgment to have the effect of renewing the period of limitation must be made by the party against whom the right is claimed; and it has been held that, as the liability to pay the debts of their wards is not transferred to guardians and managers, their acknowledgments are ineffectual to save limitation.[t]

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judgment, or to make any other application in the course of a suit, will not renew the period of limitation for enforcing the judgment or making the application. (Rama Raw *v.* Venkatisa, I. L. R., 5 Mad., 171, F. B.) See note, p. 278, *supra*.

[s] Chowdhry Chuttarsal *v.* The Government, 3 W. R., 57.

[t] Shaikh Reazoodeen *v.* The Collector, 10 W. R., 175; Azuddin *v.* Lloyd, 13 C. L. R., 112; Wajibun *v.* Kader Bux, I. L. R., 13 Calc., 292. But see Chandra Kant *v.* Ramnarain, 8 W. R., 36. Unless the guardian is shown to be legally *authorized* to make acknowledgments, his acknowledgments are ineffectual.

Acknowledgments by guardians and executors in America.

In Massachusetts, a promise or acknowledgment made within the prescribed period by a *guardian*, is treated as falling within the principle (recognised in *that* state of an acknowledgment or a payment by an *executor* or *administrator*, and therefore *sufficient* to avoid the operation of the statute, as *continuing* the existing promise in force, against the party or estate originally liable. (Buswell, paragraph 76, p. 120). In New York and most other States an acknowledgment by an executor does *not* bind the estate, and this is more consistent with the *modern* theory of acknowledgment (at common law) which is,

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If the defendant was an *infant* at the time when he made the acknowledgment, *he* must *prove* his plea.[7a]

Acknowledgment by executor or administrator of debtor binds his estate.

The case of an executor or administrator of a deceased person is very different. The probate or letters of administration vest the entire property of the deceased in the executor or administrator, and he is in all respects the legal representative of the deceased. An *acknowledgment* by an executor or administrator will, therefore, preserve a claim as against all parties beneficially interested in the property of the deceased.[8] But the mere *registry* of a claim by the executor is not sufficient.[9]

Where there are several executors or administrators the powers of all may, in the absence of any direction to the contrary in the will or grant of letters of

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as has been already observed (see pp. 276, 278, 293, *supra*), that the acknowledgment must amount to a *new promise*; and such a new promise by an executor would seem to be invalid against him for the absence of a moral consideration to support it. (Banning, 2nd Ed., p. 249). And as he cannot charge himself personally without a new consideration, he cannot charge the estate on the foundation of the old one, to the prejudice of the creditors, whose fund might be materially lessened by it. (Buswell, p. 116). An executor can have no authority to make a *new* contract or promise in behalf, but adverse to the interests, of those for whose benefit he is administering his trust. (Buswell, p. 114).

Loans made and pledges given by executors, in England.

It has been held in England that an executor or administrator *borrowing* money in that character, does *not* give the lender any claim against the testator's or intestate's estate. (Farhall *v.* Farhall, L. R., 7 Ch., 123). It may *possibly* be otherwise if the money is *actually* *applied* to purposes of the estate. (Per Lord Justice James in the same case, p. 126). The executor, however, has the power to *pledge* specific assets which is one mode of realizing them. (*Ibid.*)

[7a] Hartley *v.* Wharton, 11 A. & E., 934.

[8] See Putnam *v.* Bates, 3 Russ., 188; Brown, p. 606. Under Indian law, even the *real* estate vests in the executor or administrator. (See sec. 179, Act X of 1865; and sec. 4, Act V of 1881. In British India the executor or administrator *fully* represents the estate of the deceased. In England he represents the *personal* estate only. The *real* estate passes to the heirs or the devisee. Though an executor or administrator cannot borrow money and bind the estate of the deceased, the rule that he may bind the estate in favor of a creditor (of the *deceased*), whose claim has become barred by the statute, appears to be recognised in England, at least with the qualification that the *promise* to be effectual, must be *express* and not implied. (Tullock *v.* Dunn, Ry. and M., 416; Buswell, p. 118). An acknowledgment by an executor will take a debt out of the statute as against all parties beneficially interested. (Per Lord Cranworth in Toft *v.* Stephenson, 1 De G. M. and G., 41). Mr. Banning, at p. 250 of the 2nd Edition of his work on Limitation, says that it would probably be *now* held that an acknowledgment *not* amounting to an *express* promise would be sufficient in the case of an executor as it is in the case of the original debtor.

Acknowledgments by executors in England.

[9] Icvaradas *v.* Richardson, 2 Mad., 84.

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administration, be exercised by any one of them who has proved the will or taken out administration.[1a] If one of them, acting in his representative character, gives an acknowledgment, such acknowledgment may bind the *estate* of the deceased debtor.[1]

Acknowledgment by a trustee.

It has been held in England, that as a general rule, the acknowledgment of a debt by a trustee will be binding on the *cestui que trust*.[1a]

Acknowledgment by a receiver.

Whether a receiver, appointed by a Court of competent jurisdiction, of the estate of the debtor, or other person, against whom the right is claimed, can give an acknowledgment and renew the period of limitation, may be a question. It has been held in England that he can do so in some cases.[2] His acknowledgment is good, if he may, under the circumstances of the case, be treated as the *agent* of the debtor.

Acknowledgment by one of several joint debtors, &c.

As it ought not to be in the power of any person, by his acknowledgment, to keep alive a right of action against another, which but for such acknowledgment would have been wholly barred, it was provided by sec. 4, Act XIV of 1859, that, if more than one person was liable, none of them should become chargeable by reason *only* of a written acknowledgment signed by another of them.

Explanation 2 of sec. 20, Act IX of 1871, adopted the principle of this proviso, but it referred only to the cases of several executors and several partners. Section 21, Act XV of 1877, mentions two additional cases, *viz.*, the cases of several joint contractors and mortgagees. By the present law, in the case of these four classes of persons, it is *expressly* provided that an acknowledgment by one or more of several persons does not *by itself* bind any

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[1a] See sec. 271, Act X of 1865; secs. 92 and 93 of Act V of 1881.

[1] See Brown, pp. 607, 608; Ramnarain *v.* Chunder Kant, 8 W. R., 63. But such acknowledgment will not renew the period of limitation against the *other* executors or administrators, unless the maker of the acknowledgment is shown to have acted as their *agent*.

[1a] Toft *v.* Stephenson, 1 De G. M. and G., 28, 41; Banning, 2nd Ed., p. 214.

[2] See Brown, p. 594; and Chinnery *v.* Evans, 11 H. L. C., 115, cited in Harlock *v.* Ashberry, 19 Ch. Div., 539. As to the powers of a receiver appointed by the Court, see sec. 503, Civ. Pro. Code; and Drobomoyi *v.* Davis, I. L. R., 14 Calc., 323. See also p. 171, *supra*. When an estate is mortgaged, and a receiver is appointed at the suit of the mortgagee, the receiver is an agent of the mortgagor. So is a receiver appointed by the mortgagee under a power in the mortgage deed. (Kerr, 3rd Ed., p. 38).

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other or others of them.[3] Where the liability is *not several*, or being joint is *not apportionable*, an acknowledgment by *one* of such persons will hardly be of *any* use to the plaintiff; and it has been held in an English case that an acknowledgment by one of several joint mortgagees who were trustees, and who had therefore no apportionable interest in the premises, was ineffectual *altogether*.[4]

Where the liability is not apportionable.

Section 21 of Act XV does not refer to acknowledgments made by one of several joint mortgagors, administrators, coparceners or tortfeasors. But this omission does not justify the conclusion that an acknowledgment by one of each of these several classes of persons is necessarily binding on the others.[5] A joint co-mortgagor is a joint co-contractor, and as such, is entitled to take advantage of the provisions of sec. 21. There is no special reason applicable to the case of several administrators as opposed to several executors, which could have induced the Legislature to apply a different rule to their case. As for several coparceners, if each of them has constructively a separate and distinct possession, there is no reason to suppose why any one of them should be bound except by his own act. It may be observed that the liability of joint tortfeasors is joint, and that the law does not ordinarily allow tortfeasors to apportion their liability.[6]

Acknowledgment by one of several joint mortgagors, administrators, coparceners, or tortfeasors.

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[3] The meaning of the word "only" in sec. 21 of Act XV is that it must *also* be *shown* that the co-partner or co-contractor signing the acknowledgment had *authority*, express or implied, to do so. In a going mercantile concern, every partner may be *presumed* to be an agent of every other. Premji *v.* Dossa, I. L. R., 10 Bom., 358.

Meaning of "only" in sec. 21.

[4] Richardson *v.* Younge, L. R., 6 Ch., 478 : Banning, pp. 169, 170. The Punjab Chief Court, it would seem (see Rivaz, 3rd Ed., pp. 62, 63), would give no effect to an acknowledgment by one of two joint mortgagees in *any* case unless the maker acted as the agent of the other. The reason assigned is that there is no provision (as there is in sec. 28 of 3 and 4 Will. IV, c. 27) giving such acknowledgment the effect of breaking up the joint mortgage into portions. Mr. Justice Jardine adopted this ruling of the Chief Court, and held in a case under Act IX of 1871, that acknowledgments by persons claiming only a *fraction* of the mortgagee's rights were of no value at all. Even if such persons afterwards acquire the rights of the *other* joint mortgagees, their acknowledgment would be insufficient, because at the time of the acknowledgment they did not *fully* represent the original mortgagee. (See Bhogilal *v.* Amritlal, I. L. R., 17 Bom., 173). It would appear from the speech of the Law Member in the Legislative Council that the Legislature did not *intend* that there should be any difference between the Indian law and the English law on this subject. See Abstract of Proceedings of the Council, dated 19th July 1877.

Acknowledgment by one of two joint mortgagees.

[5] As to the English law on this subject, see Brown, p. 603.

[6] In actions for torts, no objection could (even under the old Procedure in England) be taken to the non-joinder of a co-tortfeasor as a defendant, *wrongs being in their nature separable.* (Bullen and Leake,

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By one of several joint-tenants.

It is apprehended that sec. 21 mentions those cases only in which the act of one of a set of persons is *likely* to be considered as the act of the others, and, by way of explanation, it tells us that, even in these cases, the acknowledgment of one shall not renew the period of limitation against the others. The case of one of several joint-tenants of property under the *Mitakshara*, making an acknowledgment of right, might have been mentioned, but no express reference is made to such a case.

When the person making the acknowledgment sustains, and is liable in, two *perfectly distinct* characters, the Courts look to the character in which the acknowledgment is made.[7]

Who are agents authorized to make an acknowledgment.

An agent for making an acknowledgment may be authorized to do so in any of the modes recognised by law. "No one," says Mr. Brown,[8] "can become the agent of another person except by the will of that other person. His will may be manifested in writing, or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according

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Liability of co-tortfeasors.

3rd Ed., 6). One of two co-tortfeasors may be sued separately, by the party injured. But the law does not allow men to apportion their own wrong, and does not apportion it for them. (Gonesh Singh *v.* Ram Rajah, 12 W. R., P. C., 38). Their liability, however, is joint, not *joint and several*. (Hemeudro *v.* Rajendro, I. L. R., 3 Calc., 353). In America the liability of joint tortfeasors or wrong-doers is treated as *joint and several*. But in England and India the liability of joint tortfeasors like that of joint contractors is considered to be only joint; so that a judgment recovered against *any one* of the joint contractors or joint tortfeasors, merges the remedy for the joint cause of action, and though unsatisfied, is a bar to an action against the others. (Rahmubhoy *v.* Turner, I. L. R., 14 Bom., 408). The liability of co-contractors *may* be apportionable, but that of co-tortfeasors is *not*.

A *release* to one of two joint tortfeasors is a bar to an action against the other; so also payment or satisfaction by one of the joint tortfeasors. (See Mayor *v.* Lever, 25 Q. B. D., 363, at p. 372). A *release* granted to one of two joint debtors or joint tortfeasors (according to English law) operates as a discharge of the other joint debtor or joint tortfeasor. The cause of action is one and *indivisible*, and ceases to exist as soon as one of the joint debtors or tortfeasors is released. But a mere "covenant not to sue" one of two such persons does not operate as a "release" to the other. An alleged *release* to one when limited by a proviso, *reserving* the plaintiff's rights against the other, should be construed as a mere *covenant not to sue*. (Duck *v.* Mayea, 1892, 2 Q. B., 511). In British India sec. 44 of the Contract Act expressly lays down that a release of one of two joint promisors does not discharge the other.

As to discharge *by* one of two *joint promisees*, see notes, pp. 271, 272, *supra*.

[7] Brown, p. 615; Fordham *v.* Wallis, 10 Hare, 217; Starling, p. 63.

[8] Brown, p. 624.

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to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him, but in every case it is only by the will of the employer that an agency can be created. The appointment of an agent, therefore, is either express or implied. When express, may be either in writing or by parol. When implied, may be either by the employment, or by the adoption and ratification of the acts of another person."[9] The authority of the agent may be general or special.[10]

Agent, how appointed.

It is not necessary that the authority of the agent should appear on the face of the written acknowledgment. The fact that the agent had authority may be proved by parol evidence,[1] except where the principal is a corporation aggregate.[2]

Authority need not appear on the face of the writing.

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[9] As to prior express authority, and subsequent ratification, consider the maxim *Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*, and see Ram Kumar *v.* Jakur, I. L. R., 8 Calc., 716, 718; and Dinomoyi *v.* Luchmiput, 6 C. L. R., 101, 105, P. C. A person's *own* declarations cannot make him an *agent* unless they are *ratified* by the principal. It was held in one case that it is not competent for a plaintiff, *after* the expiration of the period of limitation, to ratify the acts of *such* a person so as to make *his* receipt of rent, the receipt of the plaintiff. (Lyell *v.* Kennedy, 18 Q. B. D., 796, 814). But on appeal to the House of Lords in the same case, it has been held that though the principal cannot make a valid ratification, where there is a *jus tertii* complete, *before* the acts of the person who *assumes* the character of an agent are ratified, yet as between the self-constituted *agent*, and the ratifying *principal*, there is nothing to prevent the agency from being ratified within a reasonable time after the facts have been ascertained. The self-constituted agent in this case having received the rents of lands, on behalf of "whoever may be the rightful owner" was not allowed, though more than 12 years had already elapsed, to plead that he had dispossessed such owner, and it was held that such owner might, within a reasonable time from the date of his being ascertained to be the true owner, ratify the agent's acts by suing such agent for recovery of the land and the rents received by him. (14 App. Cas., 437).

Self-constituted agent's acts may be ratified, even after period of limitation, *if* there is no complete *jus tertii*.

An agent or bailiff *de son tort*, or an agent "of his own wrong" is one who assumes the character of agent without any appointment by the principal. An agent collecting rents even *after* his authority has been revoked by the death of the principal, is chargeable in a *fiduciary* character with the rents which he so received, and the same principle applies to an agent of his own wrong. (14 App. Cas., pp. 456, 460).

Agent *de son tort*.

As to the implied general authority of *dewans* and *mohurers*, whose ordinary duty it would be to carry on their master's correspondence, see Mohesh *v.* Bussunt, I. L. R., 6 Calc., 340, 351.

Dewans and *mohurers*.

[10] See sec. 20, Act IX of 1871.

[1] See Hemchand *v.* Vohara, I. L. R., 7 Bom., 515, 518. The Limitation Act does not even require the agent to be *authorized* in *writing*. An *implied* authority may be sufficient. (Brijmohan *v.* Rudra Perkesh, I. L. R., 17 Calc., 944, 951).

[2] Brown, p. 625. For an exception to this exceptional rule, see p. 626, *Ibid.*, and Hall *v.* Mayor, 5 Q. B., 526.

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Authority to borrow. Parol evidence.

An authority to make an acknowledgment may be inferred from an authority to borrow.[3] Even where there is a *written* general authority, other evidence may prove the existence of such authority,[4] though it is certainly better to produce the *am-mooktarnamah* or give secondary evidence of its contents, where such evidence is admissible.

Authority to adjust accounts.

Pleader's authority.

An acknowledgment signed by a person whose service as general agent of the maker had come to an end is, of course, of no effect, where the creditor or his manager is aware of the fact.[5] Authority to adjust accounts, whether special[6] or general, is sufficient for the purposes of an acknowledgment. But the authority should have reference to the claim in question.[7] A pleader making a written acknowledgment in a petition will bind his principal, if he is generally or specially authorized to make the acknowledgment, or if his acts are ratified by the principal.[8]

A person making an acknowledgment in writing at the request, and in the name, of the person liable, is his agent to all intents and purposes.[9]

Authority of the *kurta*.

It has been held that the managing member of a joint Hindu family has the same authority to acknowledge as he has to create debts on behalf of the family, but has no power, without special authority, to revive a claim *already barred* by limitation, except as against himself.[10]

Secretary of company.

In the absence of evidence of any express authority, or of any course of business from which authority might be inferred, no Court should hold that the *Secretary* of a company has authority to bind the company by his statements or *admissions*. Barnett *v.* South London Tramways Company, 18 Q. B. D., 815, 817.

[3] Dinomoyi *v.* Luchmiput, 6 C. L. R., 101, 105, P. C.

Pledging, not selling.

A power to *pledge* does not necessarily include a power to *sell*. (Bank of Bengal *v.* Fogan, 5 Moo. I. A., 27, at p. 41; Malukchand *v.* Shan Moyhan, I. L. R., 14 Bom., 590).

Parol evidence of *powers*.

[4] Sec. 91 of the Evidence Act excludes parol evidence of the *terms* of written *contracts*, *grants* or other *dispositions of property* and of *matters* required by *law* to be reduced to the form of a document—not of written *powers*. See Dinomoyi *v.* Luchmiput, 6 C. L. R., 105, P. C.

[5] See Dinomoyi *v.* Roy Luchmiput, 6 C. L. R., p. 106, P. C.; Parbuttinath *v.* Tejmoy, I. L. R., 5 Calc., 303.

[6] See 6 C. L. R., p. 107.

[7] Brown, p. 629.

[8] Ram Coomar *v.* Jakur, I. L. R., 8 Calc., 716, 718; Rambit *v.* Satgur, I. L. R., 3 All., 247; *otherwise*, under Act XIV, see Dharma *v.* Govinda, I. L. R., 8 Bom., 99.

[9] Brown, p. 630; Hemchand *v.* Vohara, I. L. R., 7 Bom., 515, 518.

[10] Chinnaya *v.* Gurunatham, I. L. R., 5 Mad., 169, F. B., which overrules Kumarasami *v.* Pala, I. L. R., 1 Mad., 385. See also 14 B. L. R. 21 (Gopal Narain *v.* Muddomuttee), as to debts *already barred*. C

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Fifthly, to whom must an acknowledgment be made.

An acknowledgment of liability to a creditor or other claimant, under sec. 19, Act XV, may be *made or addressed to a stranger*, but an acknowledgment under art. 180, Sched. II, Act XV, must be *given to the person entitled* to the money under the decree or order, or *to his agent*. Where no *money* (principal or interest) is secured by the decree or order, it would seem that no acknowledgment will be of any avail under art. 180.

Should be addressed to *some* person.

It has been held that an entry, in the debtor's own book which has not been communicated to the creditor *or* to any *other* person, not being *addressed* to *some* person or other, is not an acknowledgment within the meaning of sec. 19. (*Mahalaksmibai* v. *The Firm of Nageshwar*, I. L. R., 10 Bom., 71).

As regards limitation, acknowledgment made *before* due date, is of *no effect*.

Sec. 19, Act XV of 1877, enacts that a *new* period of limitation *shall* be computed from the time when the acknowledgment was signed. This does *not* cause time to commence to run from the date of the acknowledgment, even when otherwise it would not have commenced to run as *early*. The new period is to be calculated from the date of the acknowledgment only when that is *subsequent* to the date from which the period would *otherwise* be computed.[10a] The expression "a *new* period of limitation" in sec. 19 presupposes the *previous* running of *another* period of limitation. A written acknowledgment signed *before* (the debt has fallen due and) time has commenced to run is of *no effect* so far as shortening or extending the *time* for the institution of suits is concerned.

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the remarks of Westropp, C. J., in Bhala *v.* Parbhu, at p. 72, I. L. R., 2 Bom. See p. 271, *supra*.

Managing member's powers.

It has been held in a Bengal case that the managing member of a joint family *has* no authority to bind the other members by a *part payment* of a debt, contracted on *his own personal security* to defray expenses *common* to him and the other members of the family. (Aghore *v.* Girish, I. L. R., 20 Calc., 18, at p. 22). This case does *not* decide whether a part payment by the managing member, of a debt contracted *as a joint family debt*, would or would not bind the other members.

A barred debt can be revived by a *promise* in writing. (Sec. 25, cl. 3, Indian Contract Act).

Managing member, and Hindu widow

Although a *managing member* of a joint Hindu family cannot as such revive a *barred* debt as against his coparceners, it is competent to the *widow* of a deceased member of the family, who represents the inheritance for the time being and in whom it is a pious duty to pay her husband's debts, to bind the reversion by a mortgage executed to secure such debts, though they were barred at the time of its execution. A Hindu widow may, of course, acknowledge an *unbarred* debt. (Kondappa *v.* Subba, I. L. R., 13 Mad., 189. See also Bhau *v.* Gopala, I. L. R., 11 Bom., 325).

[10a] See Banning, 2nd Ed., p. 127.

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The *effect* of a good acknowledgment

The effect of a sufficient acknowledgment of liability, duly written and signed, is to give the plaintiff or applicant a new period of limitation *according to the nature of the original liability*, that is, of the liability which exists at the date of the acknowledgment. If a judgment-debtor duly acknowledges the right of his opponent under a decree for the possession of land, and his own liability under such decree, the judgment-creditor will have a fresh period of three years (under art. 179) from the date of the acknowledgment, although the period for instituting a *suit* for possession is twelve years. The original liability, here, is the judgment-debtor's liability to proceedings in *execution*, not the extra-judicial liability to restore the land, which, since the decree, has merged in the liability under the decree.

from the date of its being *signed* or *given*.

The liability, whatever it may be, is as if it were recreated at the date when the acknowledgment is *signed* under sec. 19, or at the date when the acknowledgment is *given* to the judgment-creditor or his agent under art. 180. It is apprehended that the date of the acknowledgment under art. 180 is the date when it is *given* to the proper person, for until then it is not a valid acknowledgment under that article.[1]

A series of acknowledgments.

Where there are several acknowledgments, it is not necessary that they should *all* be made *within* the ordinary period calculated from the *ordinary starting point* of limitation. The first acknowledgment must, indeed, be made within that period, but the second may be made within the ordinary period computed from the date of the first acknowledgment, the third within the same period from the date of the second acknowledgment, and so on. The plaintiff or applicant will be in time if he brings his suit or makes his application within the ordinary period *from the date of the latest acknowledgment* supposing there has been a continuous chain of such acknowledgments.[2]

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[1] See Jayne *v.* Hughes, 10 Ex., 430, cited in Brown on Limitation, p. 640.

[2] See Mohesh Lall *v.* Bussunt, I. L. R., 6 Calc., 340. See also Atmaram *v.* Govind, I. L. R., 11 Bom., 282 ; Venkataratnam *v.* Kamayya, I. L. R., 11 Mad., 218. This last case related to a *series* of *payments* under sec. 20, Act XV. Under art. 180, also, Sched. II, Act XV, it is *perhaps* not necessary that the acknowledgments should be made within the periods indicated above. See p. 291, *supra*.

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LECTURE XI.

PART-PAYMENTS, AND PAYMENTS OF INTEREST. EXTINGUISHMENT OF RIGHT BY LIMITATION.

Limitation Bills, 1855—1859, on the effect of payments—The English law as to payments—Under Act XIV payments did not renew the period of limitation, except in three cases—Amendments introduced by Acts IX and XV. Difference between payments of interest and part-payments—Receipt of the produce of mortgaged-land when a payment—Payments by one of several joint-debtors how far effective—Payment of *part* of a *legacy* not provided for—Payment of *part* of a debt, or of *interest* on a debt or legacy—What is a debt?—The principle on which the exception as to payments is based—*Interest* must be paid *as such*, *part-payments* need not—Appropriation of payment to *interest* by creditor not sufficient—A payment saves the *whole* claim—Payment need not be in money—Test of a good payment—Constructive payments—Sums *realized* by creditor, by sale of debtor's property, not sums *paid*—Payment *by* and *to* whom—Person liable to pay debt or legacy—Part-payment must be evidenced by the handwriting of the payer—The case of a payment, where there is more than one debt, considered—Appropriation of payments by creditor to *particular debts* sufficient—Other provisions of Act XV as to payments. Arts. 146 and 180. Indian Law Commissioners' views on the *extinction* and acquisition of rights by lapse of time—Act XIV silent on this subject—The provisions of Act IX—Section 28, Act XV, extinguishes rights to property—Right to legacies, debts or damages not extinguished by sec. 28—Sec. 28 explained—Suit not an application—Possession not the *quasi*-possession of incorporeal rights—'Rent' as an estate of inheritance is 'property'—Possession of moveables which are specifically recoverable is "possession of property"—Is a trade-mark 'property?'—Summary suits under sec. 9, Act I of 1877, not "suits for possession"—What are suits for possession of property, and what not—(Right extinguished when suit barred under arts. 46 and 47)—Is the recovery of an interest in property *possession* within the meaning of sec. 28—Right of private owners when extinguished—Right of Government when extinguished—Sec. 28 how far retrospective—The right extinguished is the right of a particular person or persons—Effect of the extinction of right—Where there has been *continuous* adverse possession—In the case of successive and independent trespassers—Continuous possession transfers the right and confers a good title—Person in whose favor limitation is running has a transmissible interest—Sec. 28 gives a good title against the party whose suit is barred—Title gained commensurate with interest extinguished—Title gained is sometimes gained on behalf of the landlord of the possessor—The doctrine of estoppel may affect the transfer of the right—Accessory rights extinguished with the principal.

Limitation Bills, 1855—1859, on the effect of payments.

THE section relating to acknowledgments in the Limitation Bills of 1855—1859 contained a provision by which an *indirect* admission,[1] by a part-payment on

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[1] Generally speaking, payment is a *mode of acknowledgment or admission*. (See Harlock *v.* Ashberry, 19 Ch. D., 539). But sec. 40 of

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account of principal or interest, was allowed to renew the period of limitation, in the same way as a direct admission in writing that a debt or legacy or any part thereof was due. But on the motion of Mr. Peacock (afterwards Sir Barnes Peacock) this provision was omitted. Mr. Peacock said: "This part of the section is in accordance with the English law, but I object to the rule laid down by the English law respecting the effect of a part-payment. That rule proceeds on the principle that a part-payment operates as an acknowledgment from which a new promise to pay may be implied. It seems to me that in this country proof of part-payment should not have this effect."[2]

The English law as to payments.

Before the Statute 9 Geo. IV, c. 14, the decisions of the Courts had established two modes, whereby a case might be taken out of the operation of the Statute of James I.[3] These were, *first*, acknowledgments, amounting to implied or express promises to pay; and, *secondly*, part-payments implying promises to pay the residue. The Statute of Geo. IV required that acknowledgments to have that effect must be in writing, but it expressly reserved the effect of part-payments. Again, the Statute 3 and 4 Will. IV, c. 42, sec. 5, expressly puts acknowledgments by writing, and acknowledgments by part-payment on the same footing, and gives a new period of limitation from the one as well as from the other.

Under Act XIV payments did not renew the period of limitation, except in three cases.

But sec. 4, Act XIV of 1859, expressly provided for the single case of an acknowledgment in writing, giving to that the same effect which it has by the English law, and impliedly excluded every other acknowledgment—an acknowledgment by part-payment, just as much as an acknowledgment by words only.[4] In *Gorachand Dutt* v. *Lokenath Dutt*,[5] it was held that a part-payment, even when it was proved by a memorandum signed by the defendant, was not

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3 & 4 Will. IV, c. 27 (like sec. 21 of Act IX of 1871, and sec. 20 of Act XV of 1877) *speaks of* payment as *distinct* from acknowledgment, while the Limitation Bills of 1855—1859, following sec. 5 of 3 & 4 Will. IV, c. 42, proposed that there should be not merely a payment, but an *admission or acknowledgment by payment*. See Brown, p. 590; and Whitley *v.* Lowe, 2 De G. & J., 712.

[2] See the Proceedings of the Legislative Council of India for the year 1859, p. 58; sec. 16 of the Bill of 1855; and sec. 19 of the Amended Bill of 1859.

[3] In modern times, Statutes of Limitation are construed more strictly, and Judges do not introduce exceptions to their operation. As to the common law doctrine of acknowledgments in cases of simple contracts, see pp. 276 and 293, *supra*.

[4] See Raja Icvara Das *v.* Richardson, 2 Mad., 84.

[5] 8 W. R., 335. But cf. A. Kristna *v.* Hachapa, 2 Mad. 307: Bheeman *v.* Eeranah, 7 Mad., 358.

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such an acknowledgment in writing as was required by sec. 4, Act XIV of 1859. What sec. 4 required was an acknowledgment in writing that the debt or a part of it *was due*, not a mere acknowledgment of a fact from which it might be *presumed* that the debt or a part of it was unpaid or due.

There were, however, three specified cases in which Act XIV allowed payments on account, to renew the period of limitation. These were, *first*, the case of suits for shares in joint family property (sec. 1, cl. 13); *secondly*, the case of suits in the Supreme Courts by mortgagees to recover immoveable properties mortgaged (sec. 6); and, *thirdly*, the case of proceedings for enforcing the judgments, decrees or orders of the Supreme Courts (sec. 19).* The last two cases were *specially* provided for in Act IX of 1871, and are similarly provided for in Act XV of 1877.

Amendments introduced by Acts IX and XV.

Section 21 of Act IX of 1871 gave a new starting point in *every* case of payment (before the expiry of the period of limitation)† of *interest* on a *debt, or legacy*. In case of *payment of part* of the *principal* of a *debt* the same section of Act IX renewed the period of limitation, but only when the debt arose from a contract in writing, and the fact of payment appeared in the handwriting of the person making the same on the instrument, or in his own books, or in the books of the creditor.* Act XV of 1877

Difference between payments of interest and part-payments.

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* Sec. 6, Act XIV of 1859, corresponded to No. 149 of Act IX of 1871 and No. 146 of Act XV of 1877. Sec. 19, Act XIV, corresponded to No. 169 of Act IX and to No. 180 of Act XV. These articles of Act IX and Act XV contain *special* provisions as to payments. No. 127 of Act IX and also of Act XV altered the law as to suits for shares in joint family property and enacted no special provision as to payments.

† The "prescribed period" in sec. 21 (corresponding to sec. 20, Act XV) is the period of *limitation*, not the period of payment of the money advanced. See Ramsebuck *v.* Ramlall, I. L. R., 6 Calc., 815. Mungola *v.* Annoda, 12 C. L. R., 277; Luvar *v.* Luvar, I. L. R., 5 Bom., 688. *Contra* Tariny *v.* Shaikh Abdur, 2 C. L. R., 346.

* An account stated is not a *contract* in writing within the meaning of this proviso. (Amritalall *v.* Maniklal, 10 Bom., 375). A tradesman's bill is not such a contract. (Thompson's Act, IX of 1871, p. 21).

The reason of the proviso as to part-payments " will be found in the wholly different mode in which the inference of an unsatisfied debt is raised by the payment of *part* of the *principal* and the *interest* respectively." (See Savigny Sys., Vol. V, sec. 315; and Tippets *v.* Heane, 1 Cr. M. & R., 252, cited by Holloway, J., in Valia *v.* Vira, I. L. R., 1 Mad., 228). A payment of money *as interest* is *not liable* to be construed as a payment in *full* discharge of the debt. The reason of the proviso in sec. 21 of Act IX was probably this: If the debt did not arise out of a contract in writing, the amount of the debt might not be easily determined at the time of payment, and the debtor might easily contend that the payment was in *full discharge* of all that he admitted to be due. See Darby and Bosanquet, p. 72.

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repealed the first half of this proviso, and extended the efficacy of part-payment to all debts whether arising out of contracts in *writing or not*. "Why," asked Mr. Wilkinson, the Recorder of Rangoon, "should a part-payment endorsed on a promissory note by the payer, or one admitted as such, in his own handwriting in the payee's bill-book, be entitled to more consideration than when a customer signs to a payment on account of principal in a shop-keeper's book, or on the bill which he has made out in respect of articles that were purchased over the counter?" And the Legislature, in 1877, thought it would suffice to provide that the fact of part-payment should appear in the handwriting of the person making it. The ordinary case of a debtor making a part-payment by letter has thus been provided for.[9]

Receipt of the produce of mortgaged land when a payment.

Act IX of 1871 did not provide that the receipt of the produce of mortgaged land by a mortgagee in possession should be deemed a payment either of the principal or the interest of the mortgage debt. Where land was mortgaged to the plaintiff with possession for a term of years, and the mortgagor took a lease of the land from the plaintiff, some years after the execution of the mortgage, and paid rent under it even after the expiry of the mortgage term, it was held that the case being governed by Act IX of 1871, the payment of rent under an agreement *entirely independent* of the original mortgage could not be regarded as a payment of interest *as such*. The Court observed: "It is pleaded that the suit is barred by limitation, to which the plaintiff replies that the receipt of rent was in fact a payment of interest, and that from the date of the payment of rent, a new period of limitation is given for the recovery of the debt. Under the present law (Act XV of 1877) this may be so, if it be held that payment of rent by the mortgagor is such a receipt of produce in virtue of a usufructuary mortgage as is deemed equivalent to a payment of interest, but this provision is not to be found in Act IX of 1871; and although, if the payment of rent had, as part of the original agreement or otherwise, been *agreed on as a provision for the interest* on the debt, we might have held it fell within the narrower terms of Act IX of 1871, yet, in the circumstances of the present case, it is impossible in our judgment to hold that the payment of rent under an agreement *entirely independent* of the original mortgage can be regarded as a payment of interest as such."[10]

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[9] See Proceedings of the Legislative Council of the 19th July 1877.

[10] Ummer *v.* Abdul, I. L. R., 2 Mad., 165. In Brocklehurst *v.* Jessop, 7 Sim., 438, it was held in England that the receipt of rents by an

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Receipt of produce of mortgaged land in *possession* of mortgagee.

Section 20, Act XV of 1877, expressly provides that "where *mortgaged land* is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section." Independently of any express stipulation to that effect, the receipt of the rents and profits of the mortgaged land (supposing the mortgagee is in possession) is, constructively, a payment either of a part of the principal, or the interest, as the case may be. Even where the mortgage is *not* an *usufructuary* one, the mortgagee in *possession* is supposed to pay, as the agent of the mortgagor, to *himself* as the creditor.[1] Where the receipt exceeds the amount of interest due, or is otherwise a part-payment of the *principal*, it is apprehended that the fact of the rents and profits having been received, must, according to the general proviso to sec. 20, appear in the handwriting of the mortgagee or his agent.

Land held under a mortgage which is compulsorily registrable but is not registered, is not "mortgaged land." (*Pichaudi* v. *Kandasami*, I. L. R., 7 Mad., 539).

Payments by one of several joint debtors how far effective.

Act IX of 1871, like 9 Geo. IV, c. 14, did *not* provide that *payments of interest* or *part-payments* by one of several partners or executors should *not* renew the period of limitation as against the *others*. But following sec. 14 of the Mercantile Law Amendment Act (19 & 20 Vict., c. 97) and the Massachusett's Revised Statutes, Act XV of 1877 extends to payments the rule applicable to *acknowledgments* of liability, and enacts that one of several joint contractors, partners, executors or mortgagees shall not be chargeable by reason only of an acknowledgment *or a payment* made by another of them.[2]

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equitable mortgagee *in possession* might be taken, *primâ facie*, as a payment either of the principal or the interest of the debt, so as to prevent time running against his claim for the *money*. (See Brown on Limitation, pp. 588, 662; and Banning, p. 77). But in a suit for recovery of *possession* by the mortgagee, a payment of rent made to him by *one* of the tenants of the mortgaged property, *in consequence of a notice requiring the rent to be paid to him as the legal owner*, was held not to be a payment *by the mortgagor*, and not sufficient to save the suit for the *whole* property from the bar of limitation. Harlock v. Ashberry, 19 Ch. D., 539. Payment of rent by a tenant of the mortgaged property, *in consequence* of a notice.

[1] Brown, p. 600. See Brocklehurst v. Jessop, cited above.

[2] See sec. 21, Act XV; p. 303, *supra*; Angell, paragraph, 281. After the passing of 9 Geo. IV, c. 14, in Wyatt v. Hodson, it was held in England that, although an *acknowledgment* by one of several joint contractors could not prevent the *others* from taking advantage of the Statute of Limitation, the effect of a *payment* was not confined to the individual making it. And before the enactment of 9 Geo. IV, c. 14, even an *acknowledgment* by *one* of two joint contractors took the *whole* case out of the Statute of Limitation. See Whitecomb v. Whiting, 2 Doug., 652; Buswell, 91. There is, however, a difference

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Payment of part of a *legacy* not provided for.

As a legacy is not necessarily payable in full, but is liable to be reduced in proportion to the assets available for satisfying it, a payment by the executor of a part of a legacy does not imply an admission on the part of the executor that a larger amount is payable. This is probably the reason why Act IX of 1871 was, and Act XV of 1877 is, silent as to the effect of a payment of a part of a *legacy*.

Payment of *part* of a debt, or of *interest* on a debt or legacy.

The payment of *interest* on a "debt or legacy," or of a *part* of the *principal* of a 'debt,' if made before the expiry of the "prescribed period," gives the plaintiff a new period of limitation, according to the nature of the original liability. The words "prescribed period" in sec. 20, Act XV, mean the period of limitation prescribed by law, and not the period prescribed by the contract for repayment. Sec. 20, Act XV, enacts that a new period of limitation *shall* be computed from the time when the payment was made. This does *not* cause time to commence to run from the date of the payment, even when otherwise it would not have commenced to run as *early*. The new period is to be calculated from the date of the payment only when that is *subsequent* to the date from which time would otherwise be calculated. A payment of interest, *before* the principal amount falls due, does not cause time to run from the date of such payment. (See Banning, 2nd Ed., p. 127). The expression "a *new* period of limitation" in sec. 20, presupposes the *previous running* of *another* period of limitation. (See p. 307, *supra*).

Payment *before* due date.

A series of payments.

Every one of a series of payments, made under the conditions required, gives a fresh starting point. (*Venkataratnam* v. *Kamayya*, I. L. R., 11 Mad., 218. See p. 308, *supra*).

What is a debt?

Servants' wages are a 'debt' within the meaning of this rule. Money due for goods sold is also a 'debt.'[3]

"In general," says Blackstone, "whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other (as in the case of a bond for payment of money, or an implied promise to

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between an Acknowledgment and a Payment, "inasmuch as the latter is a benefit to *all* persons liable to the debt, as it relieves them from so much of their liability." Act XV of 1877, like 19 and 20 Vict., c. 97, does not attach any importance to this difference.

Payment by *mortgagor* or his *surety*.

It has been held in England (Allison *v.* Frisby, L. R., 43 Ch. D., 106), that, notwithstanding the Mercantile Law Amendment Act of 1856, payment of interest by a mortgagor keeps alive the debt as against a *surety* under the Real Property Limitation Act of 1874. If it be held that secs. 20 and 21 of Act XV do not control the provisions of art. 146 as to payments, the ruling in Allison *v.* Frisby, will probably be followed in British India.

[3] Nobin *v.* Kenny, 5 W. R., S. C. Ct. Ref., 3.

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pay for goods supplied, so much as they shall be reasonably worth), a *debt* is then said to exist between these parties; while, on the other hand, if the demand be of uncertain amount, as where an action is brought against a bailee for injury done through his negligence to an article committed to his care, it is described not as a *debt*, but as a claim for damages." The *debt*, however, is not a contract, but the result of a contract.[4] There is nothing in sec. 20, Act XV of 1877, to prevent its application to debts secured by a mortgage or a judgment.[5] Sections 20 and 21 expressly refer to mortgages and mortgagees.

Debts—not unliquidated damages.

Debt includes *liquidated* damages, but not unliquidated damages which cannot be ascertained except by the decision of a properly constituted Court. "Where a bond was conditioned for the replacing, by a certain time, of stock which the plaintiff had sold out for the defendant's benefit, and for the payment in the meantime of such sums as should be equal to the dividends of the stock, a payment on account of such last mentioned sums was held not to have the effect of keeping alive the right of action for not replacing the stock, as the damages recoverable for such a breach were *unliquidated*."[6]

The principle on which the exception as to payments is based.

Payments, whether of interest or of part of the principal, are seldom made without deliberation. They are (generally speaking) *acknowledgments* of the subsistence of the debt,

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[4] See Stephen's Blackstone, Vol. II. Under English law, contracts are either simple contracts, or contracts by specialty or by matter of record. Judgment-debts are debts of record. In Kally Prosunno *v.* Heeralal, I. L. R., 2 Calc., 468, it was held that, although a sum due under a decree might sometimes be properly called a 'debt,' the provisoes to sec. 21 and art. 169 of Act IX of 1871 showed that, in that Act, 'debt' meant a liability to pay money for which a suit could be brought, and not one for which judgment had been obtained. The soundness of this ruling was doubted by Stuart, C. J., in I. L. R., 3 All., 247, F. B. And now that the proviso as to part-payments has been considerably modified, it is apprehended that sec. 20 of Act XV applies to judgment-debts as well as to other debts. See Janki *v.* Ghulam, I. L. R., 5 All., 201. The proviso to art. 180, Act XV, however, still applies to *some* judgment-debts.

Judgment debts.

[5] As to judgment-debts, see the preceding note. As to mortgage-debts, it is observable that, under art. 146, Act XV, in suits in Courts established by Royal Charter in the exercise of its ordinary original civil jurisdiction, to recover from the mortgagor the *possession* of immoveable property mortgaged, the last payment of interest or part-payment is the starting point of limitation. As to the effect of such payments, in suits in *other* Courts, for *possession* of the mortgaged property, see Brojonath *v.* Khelat, 16 W. R., P. C., 33, 35; and p. 149, *supra*. In suits to recover the *debt* or *charge* in *any* Court, payments under sec. 20 will give the plaintiff a new starting point.

Recovery of mortgage *money*, and mortgaged *land*.

[6] Darby and Bosanquet, p. 106.

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—not by words, but by *conduct*.[7] The principle upon which a part-payment in England takes a case out of the Statute of James I is, that it admits a *greater debt* to be due at the time of the part-payment.[8] The payment of interest *qua* interest, is evidence of the existence of the debt, and a payment made *as part-payment* raises the implication that the residue of the principal sum is due. The Indian Legislature, while *expressly* requiring that the interest paid must be *paid as interest*, has not *enacted* that payments of parts of the *principal* sum due must be payments *made as part-payments of the principal*.

Interest must be paid *as such, part-payments* need not.

It would seem that, under sec. 20, Act XV of 1877, if the fact of *payment* of a part of the principal of a debt appeared in the handwriting of the debtor or his agent, and the period of limitation had not expired at the date of the payment, the creditor would be entitled to a fresh period of limitation, although the *debtor intended* the payment as a payment of the *whole* debt *in full*. Such a payment is not sufficient under the common law of England, which requires an implied *promise* to *pay* the *residue*. (*Foster* v. *Dawber*, 6 Exch., 839 ; *Burn* v. *Bolton*, 2 C. B., 476). The *statutory* exception in 3 and 4 Will. IV, c. 42, sec. 5, requires not merely a payment, but an *acknowledgment by payment*. (Per Turner, L. J., *Whitley* v. *Lowe*, 2 De G. & J., 712 ; Brown, 590). The Indian Act does not require the implication of a *promise*. Nor does it *expressly* require an *acknowledgment* by payment.[9]

In the case of payment of *interest*,[10] although it is not necessary that the fact of the payment should appear

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[7] Brown, p. 587.

[8] Tippets *v.* Heane, 1. C. M. & R., 252. From the admission of the existence of the debt the law raises an implication of a *promise* to pay, and where this implication is rebutted by the circumstances of the case, the payment is not sufficient to take the case out of the Statute of James I.

[9] It has been held that the principle underlying *all* the English *statutes* of limitation (3 and 4 Will. IV, c. 27, 1 Vict., c. 28, *as well as* 3 and 4 Will. IV, c. 42) is that a *payment* to prevent the bar of limitation must be an *acknowledgment* by the person making the payment of his liability, and an admission of the right of the person to whom the payment is made. (Harlock *v.* Ashbery, 19 Ch. D., 539).

Interest.

[10] 'Interest' means not merely that which is reserved by the original *tamasook*, note, or mortgage, as recompense for the use of the money advanced, and payable *before* the principal amount becomes due, but all interest recoverable for the non-payment of money *already* due. "Interest, in its ordinary sense," says Markby, J., "means something paid for money overdue." (Ram Chunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 301). *Primâ facie*, a debt which carries interest appears to import a debt already due. (Angell, sec. 95). Payment of interest *before* the principal sum becomes

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in the handwriting of the person making the same, it must be shown that the debtor made the payment on account of interest. It has been held[1] that where payments are made in reduction of a general balance of accounts, without any intimation by the debtor that they are to be appropriated in satisfaction of interest, such payments are not payments of interest *as such* within the meaning of sec. 20. Appropriation of the payment to *interest* by the *creditor* is not sufficient, unless there are circumstances from which the payment *as interest* may be inferred.

Appropriation of payment to interest by creditor not sufficient.

Payment of interest, even on a note which does not carry interest on the face of it, and on which no demand is proved to have been made, is sufficient to take the case out of the English Statute of Limitation. It is apprehended that, if a debt properly carries interest, so that the principal and interest constitute one demand or claim, part-payments *or* payments of interest will keep alive the *whole* claim to principal *and* interest.[2]

A payment saves the *whole* claim.

The payment of interest or part of the principal need not necessarily be made in actual money. Anything received which the parties *agree* should go to reduce the debt or pay the interest, is a payment sufficient to take the debt out of the statute.[3] Payment in *goods*, or even affording maintenance to the creditor's child, may, upon agreement, be a good payment. So, upon agreement between the parties, the payment by the debtor of money

Payment need not be in money.

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due is of little importance for the purposes of sec. 20, Act XV of 1877. Such payment cannot, of course, cause time to run before the date from which it would have *otherwise* commenced to run. (See Banning, 2nd Ed., p. 127, and pp. 307 and 314, *supra*).

In common parlance, *interest* includes *damages* for non-payment. See Brown, pp. 669, 670; Forsyth *v.* Bristowe, 8 Ex., 716. Even in the absence of an express contract, interest for the delay of payment of the principal money (*post diem*) may be claimed, but such claim is, strictly speaking, in the nature of a claim for *damages* for *breach* of contract. (Cook *v.* Fowler, L. R., 7 H. L., 27; Deen Dyal *v.* Choa Sing, 25 W. R., 189, 190; Bishen *v.* Udit, I. L. R., 8 All., 486; Mausab *v.* Gulab, I. L. R., 10 All., 85, 90). The payment of such damages *as interest* will probably keep alive the debt. In Allison *v.* Frisby, 43 Ch. D., 106, there was *no covenant* for the payment of interest *subsequent* to the date on which the debt fell due; but interest at the stipulated rate was paid *after* the due date, and such payment kept the debt alive.

Interest or damages.

[1] Hanmantmal *v.* Rambabai, I. L. R., 3 Bom., 198. See also Narronji *v.* Mugniram, I. L. R., 6 Bom., 103, 106; and Surju *v.* Khwahish, I. L. R., 4 All., 512, 514.

[2] See Darby and Bosanquet, pp. 70, 71; Banning, pp. 65, 66.

[3] See Banning, p. 72; Hooper *v.* Stevens, 4 A. and E., 71; Bodger *v.* Arch, 10 Exch., 333. As to payments by *bills*, see Irving *v.* Veitch, 3 M. & W., 90.

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owing by the creditor to a third person may be a good payment.[4]

Test of a good payment.

The correct test as to what transactions between the debtor and creditor are equivalent to payments for the purpose of avoiding the statute is laid down in *Maber* v. *Maber*, (L. R., 2 Exch., 153). All the Judges of the Court of Exchequer seem to have agreed that any facts which would prove a plea of payment, if the debtor were subsequently sued for the sum alleged to be paid, would be sufficient to prove a payment within the meaning of the rule.[5]

Carrying forward amount, in debtor's books.

The mere *carrying forward* of the amount of a loan or a deposit, with the interest due thereon, in the debtor's books, though such *entry* of interest is made in the presence of the creditor, does not amount to a *payment* of interest as interest. (*Iccha* v. *Natha*, I. L. R., 13 Bom., 338).

Constructive payments.

It has been held in England that where a tenant for life of an estate subject to a charge, is himself entitled to the interest of the charge, he will be *deemed* to have kept down and paid the interest, and thus preserved the right to the capital of the charge.[6] Where the hand to give and receive is virtually the same, a *constructive payment* is sometimes presumed.[6a] But as one particular case of *constructive* payment, *viz.*, that relating to the receipt of produce of mortgaged land, is expressly mentioned in sec. 20, Act XV of 1877, it may be said that *other* cases of constructive payments are impliedly excluded.

Sums *realized* by creditor, by sale of debtor's property, not sums *paid*.

It has been held that sums not voluntarily paid, but realized by a private sale of the debtor's goods in the possession of the creditor, or by an execution-sale of the defendant's property, are not sums *paid* by the debtor or the defendant within the meaning of the Act.[7] In England, also, a part payment under *compulsion* of law is not sufficient.

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[4] Brown, p. 588; Banning, p. 73.

[5] Darby and Bosanquet, p. 80; Banning, p. 73.

[6] Brown, p. 588; Burrowes *v.* Gore, 6 H. L. C., 907.

[6a] See note 1, p. 244, *supra*. Where the person liable for the payment of interest, and the person entitled to receive it, are the same, no question of limitation can properly arise. (See Binns *v.* Nichols, L. R., 2 Eq., 256).

[7] See Rughoonath *v.* Ranee Shiromonee, 24 W. R., 20; Ramchandra *v.* Devba, I. L. R., 6 Bom., 626; Fuckoruddeen *v.* Mohima, I. L. R., 4 Calc., 529, 531; Narronji *v.* Mugniram, I. L. R., 6 Bom., 103. In this last case it was held that moneys received (by a commission agent) by surplus proceeds of goods (belonging to his customer) sold in England, subsequent to an adjustment of accounts between the parties, were not *payments* within the meaning of sec. 20, Act XV of 1877.

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because such a payment cannot amount to a *promise* to pay the balance.[7a]

Payment by and to whom.

It is necessary that the payment should be made by the "person liable to pay," or his agent duly authorized in this behalf.[8] A payment by a mere stranger without the knowledge of the debtor, or by an agent after the termination, or beyond the scope of his authority, is of no avail. The payment may be made to the creditor or to his agent, or by agreement between the parties to any person on his account.[9] Such agreement may be express or implied. The course of dealing between the parties, or even subsequent ratification, may be sufficient to prove the agreement.[9] Section 20, Act XV, it may be observed, expressly states *by* whom the payment is to be made, but it says nothing as to the person *to* whom the payment must be made. (Cf. art. 180, Sched. II. See p. 322, *infra*).

Person liable to pay debt or legacy.

In the case of a debt, the "person liable to pay" is the original debtor, or any other person who derives his liability from such debtor, or who for the time being represents his estate.[10] Payment of interest by a tenant for life has been held to be sufficient to preserve a debt, charged upon the land, against the remainderman.[1] In the case of a legacy, the "person liable to pay" is primarily the executor or administrator.

Payment by bankrupt.

A part-payment made by a person shortly afterwards bankrupt is sufficient to bar the statute, though made by the bankrupt with the intention of reviving the debt.[12a]

Part-payment of *principal* must be evidenced by the handwriting of the payer.

Payment of *interest* may be proved by *any* legal evidence,[2] but the fact of payment of a *part of the*

[7a] Worthington *v.* Grimsditch, 7 Q. B., 479. Banning, 2nd Ed., 77.

[8] See Harlock *v.* Ashberry, 19 Ch. Div., 539. A voluntary present of a sum of money by a *stranger* is not a "payment." Darby and Bosanquet, p. 166. As to duly authorized agents, see pp. 305 *et seq.*, *supra*.

[9] Darby and Bosanquet, p. 77.

[10] See Brown, p. 613; Banning, p. 186; Darby and Bosanquet, p. 91. Payment by a receiver, who is bound to pay on behalf of the debtor, may be sufficient. See Chinnery *v.* Evans, 11 H. L., 115; Harlock *v.* Ashberry, 19 Ch. D., 539.

[1] Brown, p. 612; Burrowes *v.* Gore, 6 H. L. C., 907.

Payment of interest by the executor of the debtor would keep alive the *debt* even against legatees who are bound to refund under sec. 321 of Act X of 1865. The suit to compel a refund must, however, be brought within the time allowed by art. 43 of Act XV of 1877. See Darby and Bosanquet, p. 86.

[12a] *In re* Lane, L. R., 23 Q. B. D., 74.

[2] When the *creditor* charges himself with receipt of interest or a part-payment, by way of endorsement or entry on a promissory

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Entry of payment *signed* by the payer.

principal of a debt must appear in the *handwriting* of the person making the same, *viz.*, the debtor or his duly authorized agent. It has been held by the Madras High Court that where there is a writing setting out the fact of payment, and the debtor affixes his mark or signature thereto, he adopts the writing and makes it his own, and by his signature causes the fact to appear in his own *handwriting*.[3] This interpretation is in accordance with the probable intention of the Legislature, but the language of the proviso, strictly construed, leads to a different conclusion. Where the memorandum of payment is in the *actual* handwriting of the debtor or his agent, it is not necessary that it should be *marked* or *signed* by the payer.

Secondary evidence of payment.

If the writing is not forthcoming, secondary evidence of it will be of no use. The payer's *written* memorandum of payment is the only evidence of *payment* which the Court can look to for the purposes of sec. 20. It is not necessary that the *appropriation* of the payment to *principal* should appear in *writing*. (*Jada Aukamuna* v. *Nadimpalle*, I. L. R., 6 Mad., 281).

Endorsement of cheque.

The endorsement of a *cheque* by the debtor to the creditor is *not* a sufficient memorandum of *payment* in the *handwriting* of the debtor. (*Mackenzie* v. *Tiruvengadathan*, I. L. R., 9 Mad., 271).

The case of a payment, where there is more than one debt, considered.

The *identity* of the debt on account of which a payment is made, like the *payment* of *interest*, may be proved by *any* legal evidence. "If," say Messrs. Darby and Bosanquet,[4] "more than one debt is shown to have been due at the time of the payment either of principal or interest relied on, a question arises whether such payment was made on account of *all the debts*, or was appropriated to any one or more, and if so, to *which of them*. This appropriation need not be proved by any express declaration of the debtor at the time of payment, but any expressions used by

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Entry of payment of interest on bond, &c.

note, bond or other writing, if the entry is proved to have been written before the expiry of the period of limitation, when its effect was clearly in contradiction to the writer's pecuniary interest, such endorsement or entry is receivable as evidence of the payment after the death of the writer, under sec. 32, cl. 3, of the Indian Evidence Act, 1872. See Rose *v.* Bryant, and Searle *v.* Lord Barrington, cited in Norton's Law of Evidence, 9th Ed., pp. 182, 183. Notwithstanding the provisions of sec. 3 of 9 Geo. IV, c. 14, it has been held in England that such endorsement or entry *coupled* with other evidence may be sufficient proof of such receipt. Memoranda made against their own interest of dead persons, in account books, &c., may still be used as evidence of such payment in England. (Bradley *v.* James, 13 C. B., 822; Banning, 2nd Ed., p. 79).

[3] Ellappa *v.* Annamalai, I. L. R., 7 Mad., 76, 79.

[4] Darby and Bosanquet, p. 73. See also Banning, pp. 68, 69.

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him, either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all the debts collectively, will be sufficient for this purpose. It must be observed that if the evidence shows that the payment is made on account of all, it will prevent any of the debts being barred by statute." The plaintiff must prove that the payment was made *on account of the debt* for which the action is brought. (*Tipetts* v. *Heane*, 1 Cr. M. & R., 252).

Onus on plaintiff.

The appropriation of a payment to a particular debt which a *creditor* makes, where none is made by the debtor,[5] may not (in the absence of proof of the *debtor's intention*) raise the implied promise to pay the residue which the English law (in cases governed by 21 James I, c. 16) requires. But as payments of parts of the principal amount are, by sec. 20 of Act XV, sufficient to keep alive the debt, irrespective of any promise or acknowledgment, it is apprehended that a payment appropriated by the creditor to a particular debt or debts, under the power given by sec. 60 of the Indian Contract Act, is sufficient to take that debt or debts out of the statute, if such debt or debts were not barred by limitation at the date of the payment.[6] Where there are two debts *entirely distinct* from each other, a payment *not specifically appropriated* as payment to either is not sufficient to keep alive either of the debts.[7]

Appropriation of payments by creditors to *particular* debts sufficient.

Besides the provisions of sec. 20 for *renewing* the *ordinary* period of limitation by a payment in cases connected with the recovery of *debts* and *legacies*, Act XV

Other provisions of Act XV as to payments. Arts. 146 and 180.

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[5] See sec. 60, Indian Contract Act, 1872. The appropriation of a payment to a *barred* debt will not *revive* the debt, for the payment must, under sec. 20, Act XV of 1877, be made *before* the expiry of the period of limitation.

It may be stated here that, where under the Indian Act the plaintiff cannot *recover* any of the items of an account due more than three years prior to the date of suit, he is still entitled to apply all payments (even those subsequently made) in reduction of so much of the claim as is barred. Baboo Thakoor *v.* Baboo Mohesh, 23 W. R., 390.

[6] Compare Darby and Bosanquet, pp. 74, 75; Banning, pp. 69, 70; Nash *v.* Hodgson, 6 D. M. and G., 474. The creditor, in appropriating the payment, might be *deemed* to be acting as the agent of the debtor, *even* if an implied *promise* to pay on the part of the debtor *were* necessary.

[7] Walker *v.* Butler, 6 E. and B., 506; and Burn *v.* Boulton, 2 C. B., 485; Banning, p. 69; Darby and Rosanquet, p. 73. But a payment made *generally* on account of *whatever* might at the time be due from the debtor to his creditor will exempt *all* debts due from the debtor to the creditor from the operation of the statute. (Banning, 2nd Ed., p. 73).

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Payment, in mortgagee's suit for *possession*.

of 1877, in art. 146, gives the mortgagee suing for *possession* of mortgaged immoveable property, before a Court established by Royal Charter in the exercise of its ordinary civil jurisdiction, a *new starting point* from the time of a *payment* on account of the mortgage debt. Under this article, the payment entitles the mortgagee not merely to a fresh period of twelve years, but to a *longer* period, *viz.*, thirty years from the date of the payment.[s]

Art. 180.

The provision in the case of a payment in art. 180 of Act XV would seem to be unnecessary if the word 'debt' in sec. 20 includes a judgment-debt. But some effect may be given to these provisions as they stand, by holding that a payment under art. 180 must be made *to* the person entitled to the money secured by the judgment or to his agent, while a payment under sec. 20 is sufficient, if it is made on account of the debt without taking into consideration the question *to* whom the payment is made. Thus, it may be held (see *Clark* v. *Hooper*, 10 Bing., 480) that, under sec. 20, a payment to a person *acting as, and supposed* to be, the rightful administrator of an intestate creditor, is a good payment to bar the statute in favor of the person who subsequently becomes his *proper* legal representative.

Payment to a *supposed* administrator.

As to whether payments under art. 180 must be made *before* the expiry of the prescribed period, see pp. 291, 292, *supra*.

Extinguishment of right by limitation.

Having reviewed the general rules and exceptions laid down by the Limitation Act, I shall next consider the *effect* of limitation on the substantive rights affected by it.

A brief history of statutory and judiciary law on this subject will be found in Lectures I and III.[t]

The Indian Law Commissioner's views on the extinction and acquisition of rights by lapse of time.

The following sections of the Bill drafted by the Indian Law Commissioners in 1841-1842, show that they proposed

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[s] Under sec. 6 of Act XIV of 1859, a payment in similar cases simply *renewed* the ordinary period of limitation. Under Act IX of 1871, art. 149, such a payment gave the plaintiff sixty years from the date of payment. The only reason that can be assigned for giving a *longer* period is, that where some part of the principal or interest has been paid, there is not likely to be any dispute as to the original transaction of which payment operates as an acknowledgment. See Ram Chunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 296, 303; 3 C. L. R., 336, 356. Under the English law (7 Will. IV, and 1 Vict., c. 28) the *ordinary* period is *renewed* by a payment.

[t] See Lecture I, pp. 12, 13, and 15; and Lecture III, pp. 51, 52, 55, and 56.

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that the right to *legacies*, *debts* and *damages* should be *extinguished* by limitation, and that the right to *property* should not only be extinguished, but *acquired* by adverse possession for the prescribed period:—

"Section 1.—It is hereby enacted that, subject to the exception hereinafter mentioned, a *title* by prescription shall be *acquired* in respect of *property*, moveable and immoveable, and hereditary offices, by uninterrupted *possession*, mediate or immediate, as proprietor, for six years, in the case of moveable property, and for twelve years in the case of immoveable property and hereditary offices; provided that if any other title be proved, the possession shall have been adverse thereto; and provided[10] that nothing herein contained shall be construed to affect any right arising from possession of moveable property now recognized by law."

"Section 25.—And it is hereby enacted that when, by the provisions of this Act, a person is *barred* from bringing a *suit* for the recovery of any *legacy*, *debt* or *damages*, his *right* to the legacy, debt or damages, for which a suit might have been brought by him but for those provisions, shall be *extinguished*, unless such right is secured by some mortgage, pledge or lien."[1]

Act XIV silent on this subject.

The Bills of 1855 and 1859 contained similar provisions.[2] But the Limitation *Act* of 1859 was wholly silent as to acquisitive and extinctive prescription. Notwithstanding this silence, it was held by the Courts that *easements*[3] could be *acquired* by long enjoyment, and the *right* to *immoveable property extinguished*[4] by limitation.

The provisions of Act IX.

Act IX of 1871, besides laying down rules for the direct *acquisition* of rights to *easements*, provided for the *extin-*

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[10] The reason of this last proviso was given by the Commissioners in the following words: "As the mere fact of possession already gives a right in respect to moveable property until an adverse title shall be proved, and sometimes against an adverse title, we have introduced a proviso that the proposed prescription shall not be construed to affect rights now arising from periods of negative prescription." For the present law, see sec. 108 of the Contract Act.

[1] It may be added that the Indian Law Commissioners in 1841-42, and Sir James Colvile in 1855-59, proposed rules for the acquisition and extinction of *easements* also. See Lecture XII.

[2] See secs. 1, 2, and 23 of the Bill of 1855; and secs. 1, 2, and 26 of the Bill of 1859. Section 23 of the first Bill, and sec. 26 of the Amended Bill, further provided that the *right* to bring a *suit* for the recovery of a *debt* or *legacy* (but not the right to sue for *damages*) might be *revived* by an admission by payment or written acknowledgment. As to the civil law, see p. 14, *supra*.

[3] See p. 55 (note 6), *supra*.

[4] See pp. 3, 13, 35, and 36, *supra*.

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guishment of rights to *land* and *hereditary offices*. (See sec. 29, Act IX of 1871).

Sec. 28, Act XV, extinguishes rights to property.

And now sec. 28, Act XV of 1877, extends[5] the rule of extinctive prescription to *moveable* property. The section runs as follows: "At the determination of the period hereby limited to any person for instituting a suit for possession of *any property*, his right to such property shall be extinguished."

Hereditary offices, which are often treated[6] as immoveable property in this country, are not expressly mentioned, probably because, whether rights to such offices are *immoveable* property or not, they are certainly included in the term 'property.'

Right to legacies, debts or damages not extinguished by sec. 28.

The law does not say that the right to pecuniary legacies, debts or damages shall be extinguished by the mere fact that the suit to recover them has been barred by limitation. We have already seen that when limitation bars the remedy it may leave the right *in esse*.[7]

Sec. 28 explained.

Section 28 of Act XV expressly provides that, when a person's *suit for possession* of *property* is barred by limitation under *the Act*, *his right* to such property shall be *extinguished*.

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[5] Ram Chunder *v.* Juggutmonmohiny, I. L. R., 4 Calc., 283, 297. Sec. 34 of 3 and 4 Will. IV, c. 27, corresponds to sec. 29, Act IX, and sec. 28, Act XV. Section 34 of the English Statute runs as follows: "And be it further enacted that, at the determination of the period limited by this Act to any person for . . . bringing any . . . action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such . . . action or suit . . . might have been . . . brought within such period, shall be extinguished." By sec. 1 of the statute, 'land' includes an interest in a corporeal hereditament. Sec. 34 of the English Statute does not apply to moveable property.

[6] See Chhaggaulal *v.* Bapubhai, I. L. R., 5 Bom., 68, 70.

[7] As to *debts* not being *extinguished* by limitation, see pp. 3 and 13, *supra*. As to the right to recover unliquidated *damages*, see p. 13, *supra*. The Indian Law Commissioners and Sir James Colvile proposed that the right to *damages* should be *extinguished* by limitation, and that the right to sue for *damages* should not be *revived* by payment or written acknowledgment. See the Bills referred to in note (2).

As to the right to immoveable property being *practically extinguished* by limitation in favor of the party in possession, see p. 3 (note), pp. 13, 35 (note 9). The Madras High Court, however, has held that Act XIV of 1859 did not extinguish the right. See Doe *v.* Kuppu Pillai, 1 Mad., 89. The same High Court has also held that Reg. II of 1802 did not *extinguish* the right to immoveable property. Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175.

As to Bombay Reg. V of 1827 and the operation of Act XIV in the Bombay Presidency, see p. 52, note (9), *supra*. See also Parashram *v.* Rukina, I. L. R., 15 Bom., 299.

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Suit, not an application.

An *application*[8] for possession of property may be barred by limitation, but the applicant's right to the property is not extinguished by sec. 28. A suit for possession of property may be barred by efflux of time under a *special or local law*,[9] but the right in such a case is not extinguished by sec. 28.

Possession, not the *quasi*-possession of incorporeal rights.

The *quasi*-possession of an *easement*[10] is not the "possession of property" within the purview of sec. 28 of Act XV of 1877 (or sec. 29 of Act IX of 1871). An easement is hardly an interest in land[1] and far less a *proprietary* interest. Besides, the *extinction* of easements is separately provided for by sec. 47, Act V of 1882. Section 28 of Act XV would, therefore, seem to refer mainly to corporeal property, moveable and immoveable.

'Rent' as an estate of inheritance is 'property.'

But many things which the law of England would class as "incorporeal hereditaments" fall within the category of "immoveable property." Thus *rent* as an *estate* of inheritance distinct from the land, and as distinguished from the conventional equivalent receivable under a lease, though an incorporeal hereditament, is such a proprietary interest or estate that a suit for 'rent' in *this* sense is a suit for "possession of property," within the meaning of sec. 28.[2] Where there are two persons, each of whom claims an estate in the 'rent' adverse to the other, or where the person in occupation of the land claims to hold it "free from rent,"

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[8] Such as an application under sec. 335 of the Civil Procedure Code, and art. 167 of Act XV of 1877. An *application* under sec. 318, Civil Procedure Code, and art. 178, Limitation Act, must be made within three years; but the execution-purchaser's title is not extinguished by this limitation. He may bring a *suit* within 12 years. Iswar *v.* Jai Narain, I. L. R., 12 Calc., 169, 173.

[9] Such as a suit to recover possession of land claimed by the plaintiff as an occupancy raiyat. The period of limitation, one year, prescribed by sec. 27, Act VIII of 1869, B. C., or two years, prescribed by Sched. III, Act VIII of 1885, is not a "period *hereby* limited" within the meaning of sec. 28, Act XV. But the raiyat's right, though not extinguished by sec. 28, may be held to be practically extinguished. See p. 3, note, *supra*.

[10] Easements, however, *are extinguished* by disuse under sec. 47, Act V of 1882, in Provinces to which the Act applies.

[1] Gale, 5th Ed., p. 6; 6th Ed., p. 7; and Lecture XII, *infra*. But see p. 205, note (2), *supra*, as to the meaning of "immoveable property" under Act XIV of 1859; and Sri Raja *v.* Sri Raja, I. L. R., 5 Mad., 253, 255. An easement *is* such an interest under the Statute of Frauds in England.

[2] See Abhoy *v.* Kally, I. L. R., 5 Calc., 949, 952; Darby and Bosanquet, p. 207. As to the distinction between rents that are a charge on the land, and conventional rents reserved on leases; between quit rents or rents of inheritance, and rents reserved by leases for terms of years, see Howitt *v.* Earl of Harrington, 1893, 2 Ch., 504; Irish Land Commission *v.* Grant, 10 App. Cas., 14.

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and a suit for such 'rent' is barred by limitation, the right to the 'rent' is extinguished by sec. 28. If *A* claims as against *B* to be the *malik* to whom the rent of a putnee or other permanent tenure held by *C* is payable, and *B* proves that he has, for more than twelve years, received the rent from *C* adversely to *A*, *A's* suit against *B* for the 'rent' is barred by limitation, and his right to the 'rent' extinguished by the section under consideration. As between landlord and tenant, if a tenancy is proved or admitted, non-payment of rent for twelve years or more does not extinguish the landlord's right, and as the liability to pay rent recurs after fixed intervals, he may sue for such *arrears* of rent as are not barred by limitation.[3] But if no rent has been originally assessed on the land, and the person in occupation holds it rent-free for more than twelve years, the zemindar's suit for resumption or assessment being barred by art. 130, Sched. II, Act XV of 1877, his right to the 'rent' is *extinguished*[4] by sec. 28.

Possession of moveables which are specifically recoverable, is "possession of property."

Besides suits for possession of immoveable property, suits for possession of moveables, which may be *specifically* recovered, are "suits for *possession* of property" within the meaning of the section.[5] A suit for the recovery of

[3] Poresh *v.* Kassi, I. L. R., 4 Calc., 661 ; Premsukh *v.* Bhupia, I. L. R., 2 All., 517, F. B. ; Tiruchurna *v.* Sanguvien, I. L. R., 3 Mad., 119.

"The title to the lands is one inheritance, the title to the *Kheraj* or rent is another." (Gungagobind Mundle *v.* The Collector of the 24-Pergunnahs, 7 W. R., P. C., 21).

[4] See Abhoy *v.* Kally, I. L. R., 5 Calc., 949 ; Keval *v.* The Talukdari Settlement Officer, I. L. R., 1 Bom., 586 ; Ali Bux *v.* Roop, 2 N. W. P., 106.

Suit to establish *title*, and suit for *arrears*.

Where it is not necessary for the plaintiff to establish his *title* to a periodically recurring right (*e.g.*, *malikana huqqs*, fees attached to hereditary offices, &c.), as where he has already obtained a declaratory decree on the subject against the defendant, there is nothing to restrict the plaintiff's right to recover the *arrears* falling due within the period of limitation. But when the plaintiff has (as he generally has) to *establish* his *title* before he can obtain a decree for arrears, he cannot be allowed to recover such arrears, if he come into Court too late to establish his *title*. (Chhagganlal *v.* Bapubhai, I. L. R., 5 Bom., 68, 71; Raoji *v.* Bala, I. L. R., 15 Bom., 135). Similarly, if the previous suit for *assessment of rent* is barred, the suit for *arrears of rent* must also be barred. Abhoy *v.* Kally, I. L. R., 5 Calc., 949, 952. See also Chandrabollee *v.* Lukhee, 5 W. R., P. C., 1.

When there is a *covenant* to pay a rent-charge, then, although the rent-charge may be extinguished so far as the *land* is concerned, the subject-matter of the *covenant* is not destroyed thereby. (Darby and Bosanquet, p. 388. See p. 330, *infra*).

[5] See secs. 8—11 of the Specific Relief Act. As regards *moveables*, the question whether and when the ownership of them is transferred by prescription very seldom arises, because whatever may be the form of action, all that the owner of moveables can, *except in very rare*

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money is not a suit for "possession of property." But a suit for the *specific* recovery of a particular article of moveable property is a suit for the *possession* of such property.

Is a trade-mark property?

Though a trade-mark is *property* within the meaning of sec. 54 of the Specific Relief Act, it is not *property* within the meaning of every Act or Regulation.[6]

Summary suits under sec. 9, Act I of 1877, not "suits for possession."

Section 28 of Act XV cannot apply to suits to recover possession of immoveable property under sec. 9 of the Specific Relief Act. A person dispossessed, without his consent, of immoveable property otherwise than in due course of law, may omit to sue to recover possession thereof for six months from the date of the dispossession, but his right to the property is not extinguished thereby. The Specific Relief Act *expressly* provides that nothing in sec. 9 (which, as well as art. 3, Sched. II of Act XV of 1877, prescribes the six months' limitation for such a suit) shall bar any person from suing to establish his *title* to the property and to recover possession thereof. The object of sec. 9 of the Specific Relief Act (which corresponds with sec. 15 of Act XIV of 1859) is to provide a special remedy for a particular grievance. It puts an additional restraint upon illegal dispossession, with a view to prevent the disseizor from shifting from himself the onus of proof, to the party unlawfully dispossessed.[7] If a summary suit on payment of one-half of the *ad valorem* court-fee is brought under sec. 9, within six months, even the rightful owner of the land (if *he* happens to be the defendant) is precluded from showing his *title*.[8] But it is not necessary to sue to *set aside* a

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cases, obtain, is compensation for his loss, and *not the goods themselves in specie*. Markby, 3rd Ed., 276. The question might arise in practice if the owner got back into possession after his remedies had been barred. *Ibid.*

[6] English lawyers now treat the sole right to a trade-mark as *property*—not property in the symbol itself, but in the sole application of the symbol to a particular class of goods. Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L., 533.

Trade-marks and trade-names.

Both *trade-marks* and *trade-names* are in a certain sense property. (Hall *v.* Barrows, 4 D. J. and S., 150). If the name is not impressed on the goods or on the packages in which they are contained, so as to be a trade-mark, it is only a trade-name. (Goodfellow *v.* Prince, 35 Ch. D., 9). Prior *appropriation* (without deception or misrepresentation) is sufficient to give a right to trade-marks and trade-names. *Ibid.* See also p. 6, *supra*. There may be two or more concurrent and independent rights to use the *same* trade-mark, or trade-name. *Ibid.*

[7] Kalee *v.* Adoo, 9 W. R., 602. The object of the section is "to discourage people from taking the law into their own hands, however good their title may be." Krishnarav *v.* Vasudeb, I. L. R., 8 Bom., 371, 375. See p. 162, *supra*.

[8] Khajah Enaetoollah *v.* Kishen Soonder, 8 W. R., 386, 389. In the "possessory interdicts" of the Roman Law, possession was itself

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decree passed under sec. 9. If a decree for possession on the strength of plaintiff's *title* be subsequently obtained, the effect of the decree under sec. 9 would by itself cease and determine.[9] A suit to establish *title* may be brought within the general period of twelve years,[10] and an ordinary *regular* suit to recover *possession* is *not* barred at the expiration of six months.[1] Although there are no *words* in sec. 28, Act XV, to show that a suit to recover possession of immoveable property under art. 3, Sched. II, is not a "suit for possession of property" within the meaning of the section, it could not have been *intended* by the Legislature that a *summary* suit for possession under art. 3, Sched. II, should, for the purposes of the section, be treated as a reuglar suit for possession.

What are suits for possession of property and what not.

A suit for the recovery (of possession) of a wife under art. 34 is *not* a suit for possession of *property*, and sec. 28 cannot extinguish the husband's marital rights.

A pre-emption suit is virtually a suit for possession.[2] But a suit to enforce a lien under art. 111, or a suit to enforce payment of money charged upon immoveable property under art. 132, is not, *strictly* speaking, a suit for *possession* of property. (But see pp. 326, 330).

A suit under art. 44 by a ward who has attained majority, merely to set aside a sale by his guardian, is not a suit for *possession*; but a suit under art. 94 by a person who has recovered his sanity, for property conveyed during his insanity, *is* a suit for *possession*.

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a title to the continuance or restoration of possession. Poste Gains, p. 640. The possession protected by these interdicts was possession with *or without* title and *bonâ fide*. *Ibid.*, 641.

[9] Sreenath *v.* Bishonath, 6 W. R., 268.

[10] See sec. 15, Act XIV of 1859; Eshan *v.* Zumudurroonissa, 17 W. R., 468.

[1] There is a conflict of opinion as to the evidence of *title* required in a suit for ejectment brought *after* the six months allowed by art. 3, Act XV. See 8 W. R., 386; 9 W. R., 602; and I. L. R., 7 Calc., 591; *contra*, 7 Bom., 82; I. L. R., 9 Calc., 39; I. L. R., 9 Calc., 130. According to the first three rulings, the general law on this matter is *not* affected by the provision of sec. 15, Act XIV of 1859. See also Krishnarav *v.* Vasudeb, I. L. R., 8 Bom., 371. The latest Calcutta ruling on the subject is Purmesher *v.* Brijolal, I. L. R., 17 Calc., 256. See pp. 162, 163, 164, *supra*.

[2] Sec. 214, Civil Procedure Code.

Pre-emption suits.

But to *assert* a *right* of pre-emption is not *necessarily* to sue *for possession* within the meaning of sec. 28. If the defendant is *in possession* of the property under a mortgage, and the mortgagor then sells the property subject to the mortgage to the plaintiffs, supposing the defendant has the right of pre-emption, the plaintiffs in a suit to redeem or recover the property under the deed of sale cannot succeed

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A suit to establish *right* to the present possession of property under art. 11 is not a suit for *possession*.[3]

A suit under art. 46 to recover property comprised in a survey award, or under art. 47 to recover property comprised in an order respecting possession, made under the Code of Criminal Procedure, is a suit for possession of property, and it is apprehended that possession for three years *under* such award or order gives the party in possession a title as against persons bound by such award or order. A suit for a share on *partition* of property comprised in such an order not being a suit to *recover such property* to the *entire exclusion* of the defendant, does not fall within either of these articles. (See *Parashram* v. *Rakhma*, I. L. R., 15 Bom., 299, 305). Possession for three years, *notwithstanding* such award or order, does not give any title to the party in possession, for the suit to recover possession *by* the person in whose *favor* the award or order is made, is not barred by the three years' limitation. Under the Regulations and Act XIV of 1859, possession for three years under an award or order did *not* create a title by prescription.[4] (Right extinguished when suit barred under arts. 46 and 47).

A suit for *specific* moveable property under art. 48 or art. 49 is a suit for possession of property, but a suit against an agent under art. 89 for moveable property not accounted for, is *not* necessarily a suit for *possession* of property.[5] What are suits for possession of property.

We have already observed that a suit for possession of an hereditary office, under art. 124, is a suit for possession of *property*.

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even if the defendant has neglected to assert his right of pre-emption within the prescribed period. It is not necessary for the defendant to institute a *suit for possession*. Even if a suit by the defendant to compel the plaintiffs to convey the property to him on his paying the price they have paid is barred, that would not extinguish his right under sec. 28. (Kanbarankutti *v.* Uthotti, I. L. R., 13 Mad., 490). Sec. 28 does not apply to the case of *defendants* who rely on an actual *possession* which has never been disturbed. (Hargovandas *v.* Bajibhai, I. L. R., 14 Bom., 222). Right of *defendant in possession* not extinguished.

[3] If the one year's limitation practically extinguishes the right to the property, it does so independently of sec. 28. See pp. 86, 165, *supra*.

[4] Wise *v.* Ameerunnissa, 6 C. L. R., 249, P. C. See also Mohima *v.* Rajcoomar, 10 W. R., 22. In Bombay, until 1st July 1871, possession for less than thirty years could not confer a prescriptive right. (See note 9, p. 52, *supra*, and Parashram *v.* Rakhma, I. L. R., 15 Bom., 299). Although the award or order does not determine the *title* to the property, sec. 28, Act XV, would seem to extinguish *it* after the prescribed period. Independently of sec. 28, a summary award as to possession is often *conclusive* after the expiry of the period allowed to set it aside. (Bapu *v.* Baji, I. L. R., 14 Bom., 372, at p. 376. See pp. 87, 165, *supra*).

[5] If a *particular article* of moveable property is held by a person as the agent of the true owner, it may be *specifically* recovered. Sec. 11, Act I of 1877.

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What are suits for possession of property.

A suit to enforce a right to share in joint family property under art. 127, is also a suit for *possession* of property.[6] It has been already observed that a suit for the resumption or assessment of rent-free land under art. 130 is a suit for *possession of property*.

A suit for the possession of trees is a suit for the possession of land. (*Jagrani* v. *Ganeshi*, I. L. R., 3 All., 435).

Suits under arts. 133 to 145 are suits for possession of property, but when a mortgagee's suit for possession *as mortgagee* is barred by limitation under art. 135, his right to foreclose the mortgage, or to recover the property as *absolute owner*, is not thereby extinguished.[7] The same remark applies to similar suits in Courts established by Royal Charter under art. 146.

A suit for foreclosure under art. 147, though it may lead to the payment of the mortgage money, is not a suit to recover *money*. It is strictly a suit to exclude a right given to the mortgagor, and according to Lord St. Leonards, it is a suit to *recover property*.[8]

A suit by a mortgagee for sale under art. 147, though a "suit for land," is not, strictly speaking, a suit for *possession* of land. It has been held in Calcutta that if an application for the execution of a money-decree obtained by a mortgagee against his mortgagor (before the Transfer of Property Act) is barred by limitation, the mortgagee's right to proceed against the mortgaged property by *suit* is also practically barred. (*Callynath* v. *Koonjoo Behary*, I. L. R., 9 Calc., 651). But cf. *Ganda Mal* v. *Nanak Chand*, Punjab Records, Rivaz, 3rd Ed., p. 93, and p. 326 (note), *supra*.

A suit to redeem a mortgage under art. 148 is not necessarily a suit for possession of property.

Is the recovery of an interest in property, *possession* within the meaning of sec. 28.

It may be here observed that, although some of the suits mentioned above are not, *strictly* speaking, suits for *possession of property*, such suits were covered by the general provisions of sec. 1, cl. 12, Act XIV of 1859, which applied to "suits for the *recovery* of an *interest* in immoveable

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[6] See Sitaram *v.* Khanderav, I. L. R., 1 Bom., 286; Raoji *v.* Bala, I. L. R., 15 Bom., 135, at p. 144.

[7] See Ghinarain *v.* Ram Monaruth, 7 C. L. R., 580. See also Lord Selborne's judgment in Pugh *v.* Heath, 6 Q. B. D., 345, and 7 App. Cas., 235. But cf. Srinath Das *v.* Khetter, I. L. R., 16 Calc., 693, P. C.

[8] Darby and Bosanquet, pp. 115, 116; Wrixon *v.* Vize, 3 Dru. and War., 104. A large number of cases on the meaning of the words "suit for land" in the Civil Procedure Code are referred to in the argument of Counsel in Delhi and London Bank *v.* Wordie, I. L. R., 1 Calc., 249.

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property." Rights to such *interests* were (at least, in Bengal)[8a] *practically extinguished* by lapse of time under Act XIV of 1859. The words "suit for possession of any property" in sec. 28, Act XV, will probably be interpreted to include "suit for the recovery of an interest in property" when the property is immoveable. The section will then exactly correspond to the English law on the subject, and to the law administered in Bengal before Act IX of 1871 was passed.

Right of private owners when extinguished.

As between *private* owners contesting *inter se* the title to land, the law has (in general) established a limitation of *twelve* years; after that time, it declares not simply that the remedy is barred but that the title is extinguished. The owner's cause of action or his right cannot be kept alive longer than the ordinary period of limitation by the expedient of inducing the Government or the Secretary of State for India in Council to make common cause with him.[9]

The right of the mortgagor or that of his heirs to redeem or to recover possession of the mortgaged property is not extinguished until sixty years have elapsed from the time when the right to redeem or to recover possession accrues. (Art. 148; *Chathu* v. *Aku*, I. L. R., 7 Mad., 26).

Right of Government when extinguished.

Where the Government has a right to the *possession* of land or other property, and no suit is brought within *sixty years* (under art. 149) to enforce such right, the right of the Government is extinguished under sec. 28.[10]

Sec. 28 how far retrospective.

Section 28 of Act XV of 1877 has introduced a *new* rule as regards the extinction of right to *moveable* property.[1] It is apprehended that if the period of limitation for instituting a suit for possession of such property expired *before* Act XV came into operation (and the party in possession quitted possession before that date), the *right* to the property would *not* be affected[2] by sec. 28. But if the party in possession has continued to be in possession at the commencement of the Act, and the rightful owner's suit is

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[8a] See pp. 3, 52, *supra*.

[9] Gunga Gobind Mundle *v.* The Collector of the 24-Pergunnahs, 7 W. R., P. C., 21. The title of the Government in this case resembled a seigniory. For the law in Madras and Bombay, *before* Act IX of 1871 came into operation, see p. 13 (note), *supra*.

[10] See Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175.

[1] Ram Chunder *v.* Juggut Monmohiny, I. L. R., 4 Calc., 283, 297. Mr. Justice Markby was of opinion that the right to moveables and debts was extinguished by limitation even under the old law. See Krishna *v.* Okhilmoni, I. L. R., 3 Calc., 331, 333. For the correct view, see Mohesh Lall *v.* Sumput Koeri, I. L. R., 6 Calc., 340, 355.

[2] On the retrospective operation of the analogous provision of 3 and 4 Will. IV, c. 27, see Doe d. Thompson *v.* Thompson, 6 A. & E., 721.

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barred by limitation under the Act, his right to the property is also *extinguished* by the Act. It is not necessary that the period of limitation should *begin* to run *after* the Act came into force—it is sufficient if the period *ends* after that date.

Conflict of laws.

As regards moveables (in the case of a conflict of laws) the term of the prescription, and the complete acquisition of the property must be judged by the law of the *place* at which the thing is *last* found, because it is only at the expiry of the *whole* period that the change of property takes place. When property *has been acquired* by prescription in one country, it must be recognised in every other country.[3]

The right extinguished is the right of a particular person or persons.

The right of the *particular* person, whose suit for possession of property (moveable or immoveable) is barred by limitation, is extinguished by sec. 28. If the right of a tenant for life is extinguished by limitation, it does not follow that the right of the persons entitled in *reversion* or *remainder* shall be so extinguished. So again, when one of several claimants entitled to the present possession of property is barred by limitation, it does not follow that the other claimants shall be also barred, or that *their* rights shall be extinguished by sec. 28. The title indirectly acquired under sec. 28 is, at the most, equivalent to "a parliamentary grant of the *interest*" of the party whose suit for possession is barred by limitation.[3a]

Effect of the extinction of right.

Where there has been continuous adverse possession.

When the right of a person (whose suit for possession of any property is barred by efflux of time) is extinguished, he is a wrong-doer if he attempts to exercise acts of ownership over the property as against any person who happens to be in possession.[4] Section 28 does not *say* that the right extinguished by it shall be transferred to the possessor, but there can be no doubt that continuous possession for the prescribed period *practically* conveys the property to the party in such possession.[5] It may be here observed that

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[3] Westlake, pp. 160-161; see p. 36 (note), *supra*.

[3a] Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512, at p. 516.

[4] After the determination of the statutory period, even a written acknowledgment of title or a payment of rent by the party in possession will not restore the title which has been extinguished by the statute. Saudars *v.* Saudars, 19 Ch. D., 373. A *reconveyance* will, of course, be sufficient. (See pp. 35, 168, 289, 290, *supra*, and 18 Q. B. D., 796, 814).

Even a stranger in possession of the land cannot set up the *jus tertii* in the person whose right is *extinguished*. (See Niell *v.* Duke of Devonshire, 8 App., Cas., 135, at p. 182).

[5] Gunga Gobind Mundle *v.* The Collector of the 24-Pergunnahs, 7 W. R., P. C., 21, 23, cited in I. L. R., 3 Calc., 224. See pp. 3, 4, and

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the preamble to Act IX of 1871 declared the expediency of providing rules for *acquiring ownership by possession*. And the preamble to Act XV of 1877, evidently referring to secs. 26, 27, and 28 of the Act, reiterates the expediency of enacting rules for "*acquiring* by possession the ownership of *easements* and *other property*."

Corporations and trustees may (indirectly) *acquire* right.

In the case of an indefinite number of persons represented by a corporation or by definite trustees, the property is practically conveyed to the corporation or the trustees. Thus, it has been held that municipal commissioners as trustees of lands belonging to the municipality may, under the statute, gain a *title* to the *soil* of roads subject to the public right of way.[5a]

In the case of immoveables in the Provinces of the Roman Empire, the prætor *practically* gave the benefit of *usucapio* to the party who could successfully plead *limitation* to a suit for their possession, though the ownership thus given was only *bonitarian* or equitable, as opposed to *quiritarian* or legal.[6] (Markby, 3rd Ed., sec. 551).

Where possession for the prescribed period has not been continuous, as, where there are *several* possessors holding adversely to the rightful owner, and *independently* of one

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13, *supra*. On the expiration of the prescribed period, the ownership of the adverse holder becomes complete, *except* as against some wholly *independent* title. Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, 228.

Effect of extinction of right.

"It has been said that the effect of the Statute (3 and 4 Will. IV, c. 27, sec. 34) is to execute a conveyance to the party whose possession is a bar, and that by its own force it not only extinguishes the right of the former rightful owner, but transfers the legal fee-simple to the party in possession. It is apprehended, however, that it may more strictly be said that its operation in giving a title is *negative*; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him." Darby and Bosanquet, p. 389. See Scott *v.* Nixon, 3 Dru. and War., 407; and Dixon *v.* Gayfere, 17 Beav., 421.

Continuous possession.

Possession is *continuous* when it is held either by the *same* person (without intermission) or by several persons *claiming one from the other*. A succession of independent trespasses, by even the *same* person, not being of such a character that an intention to assert a right as owner may be inferred from it, is not sufficient to create a title by prescription under sec. 28. [Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175, 183. See also p. 117 (note), *supra*].

[5a] Haigh *v.* West, 1893, 2 Q. B., 19.

[6] See p. 17 (note), *supra*. In the mofussil, at least, of British India, there is no distinction between legal right and equitable right to property. (Seedee Nazur *v.* Ojoodbya, 8 W. R., 399). Justinian abolished the Roman Law distinction between bonitarian and quiritarian ownership.

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another, it is more difficult to say in whose favor the statutory conveyance is made.[7]

Draft Limitation Bill.

There was a section in the Draft Bill, which was based on the opinion apparently held by the late Lord Romilly in *Dixon* v. *Gayfere* on the subject of successive and independent trespassers. The section ran thus:—

"30. Where a series of trespassers, adverse to one another and to the rightful owner of any immoveable property or hereditary office, take and keep possession thereof for several periods, each less than the period so limited, but collectively exceeding such period, the person who is in possession of such property or office when the title of the rightful owner would have been extinguished, had the trespassers not been adverse to one another, shall have a right to such possession."

This section, however, was struck out, because the Select Committee were not sure that the proposed rule was right, and because they believed that such a rule would be of little or no practical utility.[8]

The case of successive and independent trespassers.

Where the rightful owner has been out of possession for more than the prescribed period, and none of the independent trespassers has been in possession for the full period, the right may *possibly* vest in that one of the trespassers who has held the property for the *longest* period, or in the *first* or the *last* of the trespassers. Lord Romilly was of opinion that, as the last occupier can maintain his possession against all, including the true owner, whose right is *ex-hypothesi* extinguished, the *right* vests in such occupier.[9]

But it may be observed that if *A*, the party in possession at the time when the title of the rightful owner is extinguished, is himself dispossessed by another trespasser who holds the property for a much longer period than *A*, it would be hardly fair to declare the title in favor of *A*, simply because he happened to be in possession at the *end* of the period of limitation for the rightful owner's suit for possession.

In *Asher* v. *Whitlock*,[10] Cockburn, C. J., expressed an opinion in favor of the *first* trespasser. Messrs. Darby and

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[7] This difficulty cannot arise in cases falling under art. 144 of Act XV of 1877. See p. 169, *supra*.

[8] See the speech of the Law Member in the Legislative Council, 19th July 1877. The learned editors of Smith's Leading Cases make a suggestion similar to that made by the framers of the Draft Bill.

[9] Dixon *v.* Gayfere, 17 Beav., 421.

[10] L. R., 1 Q. B., 1. Priority of possession, it was held, was sufficient proof of title against a subsequent trespasser whose possession did

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Opinion of some authors on this point.

Bosanquet would draw a distinction between cases where the first trespasser has been in possession for a very short time, and where he has been in possession for a very considerable time. They ask whether the presumption of title of a succeeding trespasser ought not to prevail against a prior possessor, if the former has been in possession for a much longer period than the latter.[1] Mr. Banning, in his work on the Limitation of Actions,[2] says that whatever difficulties may exist in the theory countenanced by Lord Romilly, equal or greater difficulties will be found in any theory which gives back the title to the *first* of the trespassers at the expiration of the statutory period.

In Bengal, there is at present a conflict of opinion as to the sufficiency of mere prior possession (not extending over twelve years) in proving a title.[3] Here, therefore, there are still greater difficulties in the theory propounded by Cockburn, C. J.

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not extend over the full period of limitation. See p. 163, note, *supra*.

[1] Darby and Bosanquet, p. 392. Where it is proved that *A* was in possession for eleven years and *B* for nine years as successive and independent trespassers, *B's* suit for ejectment against an assignee of the true owner who succeeded by some means in getting into possession, may be dismissed on the ground that there is *primâ facie* evidence of the title being in *A*, of which the defendant is entitled to take advantage. See Doe *v.* Barnard, 13 Q. B., 945, 953. See also p. 165, *supra*.

[2] Banning, p. 106. In Goodtitle *v.* Baldwin, 11 East, 488, a prior possessor sued a person who had been in possession for several years immediately before the suit, and it was held that the plaintiff must recover by the strength of his own title, and not by the weakness of that of the defendant.

[3] See Joytara *v.* Mahomed, 11 C. L. R., 399, 406; I. L. R., 8 Calc., 975, and pp. 162, 328, *supra*.

Conflict of opinion on the value of mere prior possession.

Possession, if unexplained, is evidence of rightful ownership at the time (notwithstanding sec. 15, Act XIV of 1859). See Kalee Chunder *v.* Aboo Sheikh, 9 W. R., 602. Where the evidence does not disclose a better title in any person, the prior possession of the plaintiff is itself a prior possessory title against a person who has wrongfully dispossessed him. Mr. Justice D. N. Mitter held that this rule is not affected by the provisions of sec. 15, Act XIV of 1859. (Khajah Enaitoolah *v.* Kishen Soonder, 8 W. R., 386). Sir Richard Garth, C. J., also is of the same opinion. (See Mohabeer *v.* Mohabir, I. L. R., 7 Calc., 591). Prinsep, Tottenham, and O'Kinealy, JJ., are of a different opinion—see Debi *v.* Issur, I. L. R., 9 Calc., 39; Ertaza *v.* Bany, I. L. R., 9 Calc., 130. See also Jhoomuck *v.* Burral, 21 W. R., 52. See pp. 160 to 169, *supra*. Sargent, C. J., and Kemball, J., have recently held that the remarks of the Privy Council in Wise *v.* Ameerunissa, 6 C. L. R., 249, on which Prinsep, Tottenham, and O'Kinealy, JJ., rely, must be read in conjunction with their finding that the *evidence disclosed a better title in the defendants*. (Krishnarav *v.* Vasudev, I. L. R., 8 Bom., 371, 376). Mr. Justice Pigot of the Calcutta High Court is of the same *opinion*, but in Purmesher *v.* Brijolal, I. L. R., 17 Calc., 591, the learned judge followed the rulings in

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Continuous possession transfers the right and confers a good title.

But where there is *continuous* possession for the requisite period by or through the original disseizor, the law practically confers a good title on the possessor. The principle adopted in Bengal, even before Act IX of 1871 came into operation, was that the period of possession which was sufficient to bar the remedy was also sufficient to *transfer* the right. Sir L. Peel and Sir J. Colvile in *Shib Chunder* v. *Shibkissen*, 1 Boulnois' Reports, 70; Mr. Justice Markby in *Ameeroonissa* v. *Amir Khan*, 17 W. R., 119; Sir Richard Couch in *Ramlochun* v. *Ramsoonder*, 20 W. R., 104; and Sir Richard Garth in *Mohunt* v. *Moosharoo*, 25 W. R., 282, and *Gossain Doss* v. *Issur Chunder*, I. L. R., 3 Calc., 224, acted upon this principle.

Declaration of title.

Even in a suit for *declaration of title* and confirmation of proprietary right, the plaintiff is entitled to a decree, if he has been in possession of the land for the prescribed period, and the nature of the case and the state of the pleadings admit of the plaintiff's asking for a declaration of title by possession.[4] Possession for the prescribed period being a good title by itself, the Court cannot refuse to recognise that any more than it can refuse to recognise a conveyance from a previous owner.[5] But no decree can be given in favor of the plaintiff upon a ground which is not suggested in the plaint or in the issues tried.[6] The question of a

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I. L. R., 9 Calc., because they were the more recent rulings of the Calcutta Court, and because they had not been overruled by a Full Bench. (See p. 162, *supra*). The prætorian law of the Romans, from the time of Cicero (B. C., 66), allowed a plaintiff who had *commenced* the *usucapion* of property without being able to complete it, to recover possession by what was called the Publician action, provided the *defendant* could not prove that he had a *better title* in himself. Poste Gaius, p. 521; Moyle, Justinian, p. 531. But usucapion possession was possession under a title *believed to be just*. Poste Gaius, p. 641. See pp. 16, 17, *supra*, and I. L. R., 20 Calc., p. 839.

Declaration of title to a *tenure*.

[4] Ram Lochun v. Ram Soonder, 20 W. R., 104. But mere proof of possession for more than 12 years does not amount to proof of a *mokururree* title. Shiv Doyal v. Mohabir, 2 B. L. R., App., 8. And where a tenant asks for a declaration of his title to a tenure, and failing to prove the particular title set up in the plaint, only shows nineteen years' possession, the Court is not justified in declaring that the plaintiff holds the *particular tenure* alleged by him. See Ram Coomar v. Gungapersad, 14 W. R., 109 (foot-note), as explained in 20 W. R., 104, 105; Gossain Doss v. Issur Chunder, I. L. R., 3 Calc., 224, 227; and Goluck v. Nundo, I. L. R., 4 Calc., 699, 703.

Tirumalasami v. Ramasami, 6 Mad., 420, is in direct conflict with Sir Richard Couch's decision in 20 W. R., 104.

[5] Shiro Kumari v. Govind Shaw, I. L. R., 2 Calc., 418, 421.

[6] Bhaygo v. Mahomed, 25 W. R., 315. Where there has been no allegation of adverse possession in the plaint, and no issue raised as to it before the Courts below, their Lordships of the Privy Council would not allow the plaintiff to set up a title by adverse possession.

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possessory title should be properly raised in the plaint or in the issues, so that the defendant may have *notice* that such a point was going to be raised.[r]

A person in possession of land *without title*, even if such possession has *not* extended over the full period of 12 years,

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(Babu Ram Singh *v.* Deputy Commissioner, I. L. R., 17 Calc., 444, at p. 448, P. C.)

As to specific *mukrurri* or *leasehold* titles, in a suit against the *landlord* or his representative, see Bijoya *v.* Bydonath, 24 W. R., 444, and Brindabun *v.* Dhananjoy, 4 C. L. R., 443; I. L. R., 5 Calc., 246; and note (4), above.

[r] Shiro Kumari *v.* Govind Shaw, I. L. R., 2 Calc., 418. The question should be raised with sufficient clearness in the Court of first instance to enable the defendant to understand that the plaintiff claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. (Krishna Churn *v.* Pratab Chunder, I. L. R., 7 Calc., 560. See also Joytara *v.* Mahomed, I. L. R., 8 Calc., 975). In Shiro Kumari's case the plaintiff sued for a *declaration* of title. In the last two cases the suit was for *recovery of possession*, and the plaintiff obtained a decree in the first Court on the strength of a title by twelve years' adverse possession which he had not set up. But as the defendant had *no notice* that the plaintiff relied on such a title, the suit in each case was ultimately dismissed. In Sundari Dassi *v.* Mudhoo Chunder, I. L. R., 14 Calc., 592, the plaintiff failed to prove the title alleged in the plaint, and the first Court held that as a title by twelve years' adverse possession had not been set up and no issue raised as to it, the plaintiff was not entitled to recover possession. The first Appellate Court gave the plaintiff a decree on the strength of the title by prescription. On second appeal the High Court held that as the suit was one for *possession* and the defendant had express *notice* in the memorandum of first appeal that the plaintiff relied on the title by twelve years' adverse possession, and as he took no objection on the ground that he should be allowed an opportunity to call evidence to rebut it, and as he had consequently not been prejudiced by the course adopted by the lower Appellate Court, the decree of that Court should be confirmed.

Defendant must have *notice* that plaintiff relies on prescription.

Where the possession is referable to an alleged specific title, and to that *alone*, and the specific title is disproved, the possession avails nothing. (Rajah Haimun *v.* Koomer Gunsheam, 5 W. R., P. C., 69). In this case the plaintiff failed to prove his allegation that the defendant had fraudulently acquired possession. He also failed to prove his *title* as the adopted son of the defendant's husband. Assuming that plaintiff's *prior possession* for a number of years was proved, their Lordships of the Privy Council said: "It is perfectly clear, upon the plaintiff's own shewing that such possession is referable to his alleged title by adoption, and to that alone. If there was no title by adoption, the possession avails nothing." (See pp. 161, 167, notes, *supra*). A party in possession cannot prescribe contrary to the title on which he relies. (Per Lord Watson in A. C., 1893, 104, at p. 107). Lord Hannen in the same case said: "With regard to the claim of the company to hold by prescription and immemorial possession it is unnecessary to consider what would have been the effect of the evidence, if the title of the company had rested upon this basis alone, because as the true root of their title has been shewn by the company themselves, there is no room for the application of the law of prescription." *Ibid.*, p. 122).

One cannot prescribe contrary to the title on which (alone) he relies.

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Declaration of *quasi*-title gained by mere prior possession.

may bring a suit to have his title to possession *declared* as against a mere trespasser who without any shadow of a title is contesting his right to possession. Though not yet the sole and absolute owner, he is lawfully entitled to possession, and under sec. 42 of the Specific Relief Act he is entitled to a *declaration* of his rights against the person who without any right is attempting to disturb such possession. The plaintiff's possession for much less than twelve years is sufficient evidence of title against such a defendant.[7a]

Person in whose favor limitation is running has a transmissible interest.

It has been further held that the title of the wrong-doer can be transferred to a third person whilst it is in *course* of acquisition and before it has been perfected by a possession for the full prescribed period.[8] The person in possession may waive whatever estate he may have acquired *before* the period of limitation has expired.[9] Where the full period has *run out*, and the right of the owner has been extinguished, a mere acknowledgment of the right by the adverse holder does not revive the right so extinguished.[10]

Sec. 28 gives a good title against the party whose suit is barred.

Section 28 of Act XV extinguishes the right and title of the person out of possession, and as *against him* gives to the title of the person in possession legal force and validity. A Court of Justice would force upon a purchaser a title so acquired, and a purchaser may take that title with safety.[1]

Title gained commensurate with interest extinguished.

The title gained by possession being limited by right yet remaining unextinguished, is *commensurate* with the interest which the rightful owners have lost by the operation of the Act, and must have the same legal character and be an interest in perpetuity, or for life or for a term of years, &c., &c.[2] If the person whose suit for possession has been barred by the Act had a leasehold interest only, the party in possession cannot have a higher interest.[3] Similarly, adverse possession against either a mortgagor *or* mortgagee does not necessarily give the possessor an absolute right against *both*.[4]

[7a] Ismail *v.* Mahomed, L. R., 20 I. A., 99 ; I. L. R., 20 Calc., 834, P. C.

[8] Brindabun *v.* Tarachand, 20 W. R., 114 ; Gosain Dass *v.* Issur Chunder, I. L. R., 3 Calc., 224. See also pp. 166-168, *supra*.

Query.—Is simple consent sufficient to transfer such an interest, or is a *writing* necessary under Act IV of 1882 ?

[9] Brown, 580 ; Doe *v.* Groves, 10 Q. B., 486.

[10] See pp. 168, 289, 290, *supra*.

[1] Brown, 731 ; Scott *v.* Nixon, 3 Dru. and War., 388 ; Gunga Govind *v.* The Collector, 7 W. R., P. C., 21.

[2] Darby and Bosanquet, p. 390. See pp. 4 (note), 131 *et seq.*, *supra*.

[3] See p. 143, *supra*.

[4] See pp. 152, 153, *supra*.

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Title gained by lessee is sometimes gained on *behalf* of his landlord.

When a person takes wrongful possession of land and keeps it for the prescribed period, claiming to be *absolutely* entitled to it, or *not* claiming a *limited* interest therein, he gains, for his *own* benefit, the whole estate in perpetuity as against persons whose suits for possession are barred by limitation.[5] But if a lessee, during the continuance of his lease, takes possession of contiguous lands belonging to a third person, and holds it *as part of the demised premises* for the prescribed period, he acquires the lands for the benefit of his *landlord*.[6]

Title gained against Hindu widows.

Again, if the party in possession has all along *claimed* a *limited* interest in the property, he can acquire only a limited and *not* an *absolute* right under sec. 28. (See pp. 121, 130, 151, *supra*. and *Sankaran* v. *Periasami*, I. L. R., 13 Mad., 467). Under the old law, *i.e.*, the law before Act IX of 1871 came into operation, adverse possession for 12 years against a childless Hindu widow would have barred the reversionary heir's suit for possession, and would therefore have extinguished *his* as well as the widow's right to the property of her husband. But under the express provisions of art. 142, Act IX, and art. 141, Act XV, even if the widow's suit for possession is barred by limitation, the reversionary heir gets a fresh start on the death of the widow. Under the present law the personal *limited* interest only of the widow is extinguished if her suit for possession is barred by limitation; and the adverse holder cannot claim a title higher than what the widow might have created by a conveyance of her limited interest. (See *Sambasiva* v. *Rugava*, I. L. R., 13 Mad., 512).

The doctrine of estoppel may affect the transfer of the right.

A tenant-for-life affected to devise the estate to *B* for life with remainder to *C*. The reversionary heir did not interfere, and *B* took and held possession for more than twenty years. *B* then conveyed the premises absolutely to the defendant, and died shortly after the transfer. The assignee of *C*, the remainderman, brought ejectment. It was held (in England), that *B*, who claimed only a *limited interest under the will*, did not acquire a title as against the remainderman under the same will, although the will itself was inoperative. *B* entering under the will was *estopped* from disputing the validity of the will, and setting up a possessory title as against the remainderman.[7]

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[5] See Darby and Bosanquet, p. 394; see also p. 121 (note 1), p. 151 (note 1), and p. 167, *supra*.

[6] Darby and Bosanquet, p. 395. See pp. 138, 139, *supra*, and I. L. R., 10 Calc., 820.

[7] Darby and Bosanquet, 394; Banning, 107; Board *v.* Board, L. R., 9 Q. B., 48. It seems that, if in such a case, the will does not

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Accessory rights extinguished with the principal.

When the principal right is extinguished by limitation, the extinction of an accessory right follows as a matter of course. When the right to an hereditary office is extinguished by limitation, the right to the profits of the office, whether accruing within the period of limitation or not, is also gone, in the same way as when the principal debt is barred by limitation, the right to interest on the debt though not barred cannot be enforced.* Section 48 of Act V of 1882 expressly enacts that when an easement is extinguished by non-user or otherwise, the rights (if any) accessory to such easement, are also extinguished.

Liability of the dispossessor to pay rent or revenue.

If a *zemindar*, *patnidar*, or tenure-holder is dispossessed of his estate, *patni* or tenure for more than the prescribed period of limitation, the dispossessor on acquiring the right of the party dispossessed, becomes practically liable to pay the revenue or rent payable on account of the estate, *patni* or tenure—the estate, *patni* or tenure *itself* being liable for the revenue or the rent. In the case of an actual disseisin at the common law, the disseisor usurped the place and feudal relation of the disseisee from the date of the disseisin, and was responsible to the lord for feudal dues and services. (See *Taylor* v. *Horde*, Smith's Leading Cases).

Where the owner suffers dispossession of a *part* of the estate or tenure, the dispossessor acquires the ownership of the *part*, after the expiry of the prescribed period, and becomes practically liable for revenue or rent as a co-owner, or co-sharer of the party dispossessed.

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purport to pass the *specific* land in question, a possessory title may be gained against the remainderman. Paine *v.* Jones, 18 Eq., 320, cited in Banning on Limitation, p. 110.

* See Tammirazu *v.* Pantina, 6 Mad., 301 ; Valia *v.* Virarayan, I. L. R., 1 Mad., 228, 231. See also Hajee Syud Mahomed *v.* Mussamut Ashrufoonissa, I. L. R., 5 Calc., 759. Where the principal right created by a grant is extinguished by the *cancellation* of the grant, the accessory right to monies *already* due may survive the extinction. Morbhat *v.* Gungadhur, I. L. R., 8 Bom., 234, 236. Cf. Chhaganlal *v.* Bapubhai, I. L. R., 5 Bom., 68.

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LECTURE XII.

EASEMENTS.[1]

Different significations of the term "easement"—1st sense—2nd sense—3rd sense—4th sense—5th sense—Easements should be distinguished from rights of property, natural rights, rights in gross, customs, licenses, and other incorporeal rights—Distinguished from rights of property—The nature of julkur rights—Party-walls—Easements distinguished from natural rights—Nuisances, and disturbances of easements—Easements distinguished from licenses—Easements distinguished from customs—Easements distinguished from rights *in gross*—Public ways—Easements distinguished from other incorporeal rights—Monopolies, patent-rights, copy-rights, ferries, &c. (Highways, thoroughfares, and towing-paths)—Certain incorporeal rights how acquired—Trees encroaching on a neighbour's land—All restrictions are not servitudes or easements—No easement consists *in faciendo*—*Nulli res sua servit.* (*Hauts* and markets—Liability to repair walls and embankments)—Servient owner cannot require easement to be continued—Reciprocal easements—Artificial water-courses—Cross-easements—How far the causes of easements must be permanent—Indivisibility of easements—Easements affirmative or negative—There is no *purely* affirmative or negative easement—Easements continuous or discontinuous—Apparent or non-apparent—Urban or rustic—Inconsistent and subordinate easements—Every system of law recognizes servitudes—Mahomedan law—Hindu law—Servitudes recognized by the Civil law—Easements recognized by the English law—Profits *à prendre* recognized by English law—May easements not now known to the law be created?—Right to prospect, privacy, &c.—Indian statutory law before 1882 almost wholly silent on the subject of easements—Points of difference between the English and the Indian law—The Indian Easements Act, 1882—Easements have a *special* origin—Modes of origination: I. Express grant—II. Implied grant or reservation—Easements of necessity—*Quasi*-easements. Disposition of owner of two tenements—*Quasi*-easements when *impliedly* granted or reserved—Instances of easements of necessity—Instances of *quasi*-easements—Where *express* words are necessary—Effect of the words "appurtenances" and "easements enjoyed therewith"—III. Local custom—IV. Estoppel—V & VI. Prescription, and Presumption of lawful origin—Prescription at Common Law—The fiction of a lost modern grant—Statutory prescription in England—Difference between a twenty and a forty years' user—The English prototype of the Indian Law of Prescription—Four ways of claiming easements by long enjoyment in England—The second recognized in British India—Statutory prescription in British India—The Act is remedial, and

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[1] Besides the provisions relating to the extinction of the right to *property* treated of in the last Lecture, the law of prescription in British India includes some rules relating to the acquisition and extinction of the right to *easements* by prescription. This portion of the law of *prescription* is the *main* subject of the present Lecture. See pp. 9, 10, 11, and 12, *supra*.

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neither prohibitory nor exhaustive—Presumption of a lawful origin—Duration of enjoyment required—Quality of enjoyment required—Enjoyment need not continue till within two years of suit—Otherwise under the statutory rule—25 or 30 years' enjoyment, whether ending within two years of suit or not, will raise the *presumption*—The present statutory rule of prescription—Whether a fluctuating body of persons can claim under the rule—Enjoyment must be peaceable—Enjoyment must be open, except in the case of light, air, and support—Enjoyment *as an easement* necessary—Unity of title and unity of possession—Enjoyment must be *as of right*—Enjoyment *by* whom?—What constitutes enjoyment—Proof of continuous enjoyment *for* the prescribed period—What is or is not an interruption—Effect of repeated adverse obstructions and voluntary discontinuances—Effect of interruptions in enjoyment as *an easement* and as *of right*—Computation of the prescriptive period—Conditional exclusion in favor of reversioner of servient heritage—Effect of the exclusion—The rule of prescription how far binding on Government—Prescription in British India does *not* imply a grant—The rule applies to negative as well as to affirmative easements—Interruption of enjoyment of easement need not be conveniently practicable—But enjoyment must be *capable* of interruption—What easements cannot be acquired by prescription: 1. Right destructive of servient heritage or of subject—2. Right to free passage of light or air to open space—3. Right to surface-water not flowing in a stream, and not permanently collected—4. Right to underground water not passing in defined channel—Rights acquired by prescription are absolute and permanent—Prescription legalizes previous user—Extent and mode of enjoyment of prescriptive rights—How far mode and place of enjoyment may be altered—Extent of prescriptive right to receive light or air, or to pollute air or water—Implied acquisition of accessory or secondary easements—Extinction of prescriptive right: 1. When released—2. When it becomes useless—3. When there is increase of burden by permanent change in dominant heritage—4. When there is permanent alteration of servient heritage by *superior force*—5. When either heritage is completely destroyed—6. When there is unity of title—7. When the right has not been enjoyed for twenty years—(Light prevented falling at an angle of 45 degrees)—Rules of extinctive prescription under Act V of 1882—Analogous rules under the English and the old Indian law.

Different significations of the term 'easement.'

The term *easement* has scarcely any settled import.[2] It is sometimes used as almost synonymous with *servitudes*, which are certain rights *in rem in re alieno solo*,—certain rights, availing against the world at large, over the land of another. These rights are rights of *definite and restricted user*. They are *definite* fractions subtracted from the owner's indefinite rights of *user and exclusion*.[3] An *easement*, in this sense, is a particular right over land not

1st sense.

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[2] See Austin, Lectures, 49.

[3] See Austin, Lectures, 51 and 52. The full rights and powers of using, of taking the produce or fruits of, and of disposing of, the subject of *dominium*, are designated *jus utendi*, *jus fruendi*, and *jus abutendi*, or shortly, *usus*, *fructus*, and *abusus*. Another element is equally important, the right of exclusion—*jus prohibendi*. (See Poste,

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amounting to absolute or modified *ownership*. Such a right may be either (1) real, prædial or appurtenant; or (2) personal or *in gross*.

In a second and less extended sense, the term 'easements' is *restricted* to real or prædial servitudes, *i.e.*, such as are appurtenant to some land or *prædium* of the person 2nd sense.

Gaius, 164). Dominium or ownership consists of these rights and powers. Servitudes are *definite* fragmentary rights separated from the full rights of ownership. These fragmentary rights affect the owner's right of using the property, taking its produce, and excluding others from it. But the person entitled can only use the subject to an extent exactly circumscribed. They are termed *ser itudes*, because the property is under a kind of slavery or service, for the benefit of the person entitled to exercise such fragmentary rights. The serving property is called the servient tenement or heritage. If a servitude is appurtenant to any property, the property to which it is appurtenant is called the dominant tenement or heritage. The owner or occupier of the dominant heritage is called the "dominant owner." The owner or occupier of the servient heritage is called the "servient owner." In the Roman law, the dominant heritage was called the "locus superior," and the servient heritage was called the "locus inferior." (Markby, 3rd Ed., sec. 409). Lands, houses, and other things permanently attached to the earth are tenements or heritages. *Land* includes land covered by water. (Chundee Churn *v.* Shib Chunder, 6 C. L. R. 269; I. L. R., 5 Calc., 945). It also includes things *permanently* attached to the earth. (Sec. 4, Act V of 1882). Dominium.

Rights of property and easements.

The *nudus usus*, *usufructus*, *habitatio*, *superficies*, and *emphyteusis* of the Roman lawyers are not servitudes *properly* so called. *Usus* was the right of personally using the thing without the right of letting it out. *Usufructus* included the further right of leasing the thing and selling its fruits. *Habitatio* was the right of occupying a house. These *personal* rights were usually estates for life. (Poste, Gaius, 167). *Superficies* was the right of the owner of a building standing on the land of another. *Emphyteusis* was a perpetual lease of land under a corporation. All these five rights where *jura in re aliena*, but the latter two, at least, were not recognized as *servitudes* by Justinian. In the language of the English law, they would be styled rights of *property*. Several other rights *in re alieno solo*, such as the right of a mortgagee in the property mortgaged (*pignus*) are also not *ser itudes* proper, but rights of *property modified* by regard to the rights of the mortgagors.

Savigny's definition of "servitude" is as follows:

Savigny.

A servitude is a single or *particular exception* (accruing to the benefit of the party in whom the right resides) from the *general power* of user and exclusion residing in the owner of the thing.

Moyle.

Moyle's definition is as follows: A servitude is a *real right*, vested in or annexed to a definite person or piece of land, over some object belonging to *another*, and limiting the enjoyment of that object by that other in a *definite* manner.

In fact and practice all the real servitudes of the Roman law are servitudes over *immoveables*. Austin, Lect. 50. See also Markby, 3rd Ed., sec. 407.

Code Napoleon.

According to the Code Civil, art. 637, "a servitude is a *charge* imposed upon an *heritage* for the *use and advantage of an heritage* belonging to *another* proprietor."

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claiming them. In this sense, personal servitudes, or servitudes *in gross* are *not* 'easements.' According to Lord St. Leonards, a dominant tenement is not necessary to the existence of an 'easement,' but later authorities (including Lord Cairns) are very distinctly of opinion that there can be no easement *properly* so called unless there be *both* a servient and a dominant tenement.[4]

3rd sense.

In a third and still more restricted sense, 'easements' mean such real servitudes as are acquired merely for the *ease, convenience,* or *accommodation* of the dominant owner, and not for any participation in the *profits* of the servient heritage, that is, such rights as do not entitle the dominant owner to take out of the servient tenement, any corporeal thing except water. Messrs. Gale and Goddard[5] adopt this third sense of

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Easement, a right. Servitude, a duty.

The term servitude is used to express both the *right* and the corresponding *duty*. The term easement generally expresses the *right* only (Gale, 6th Ed., p. 2). The servitude relating to tithes in England is never styled an 'easement.' A right to prædial tithes is a right to a definite portion in the produce of another's land. The German term Dienstbarkeit is equivalent to the term servitude. (Markby, 3rd Ed., p. 203).

[4] See Gale on Easements, 6th Ed., pp. 11 and 12. Austin in his Lectures (see p. 831—850) and Willes in his Notes on Gale seem to think that an easement in *gross* may be (conferred and) *enforced* in the same way as an easement appurtenant. Lord Cairns in Rangeley *v.* The Midland Railway Co., L. R., 3 Ch. Ap., 306, said: "There can be no easement properly so called unless there be both a servient and a dominant tenement. Customary and other *rights in gross* are specially saved by cl. (b), sec. 2, Act V of 1882. (Chhananam *v.* Manu, 1 Mad. Law Journal, p. 47).

Gale.

[5] Gale's definition is as follows: "An easement is a *privilege without profit*, which the owner of one *neighbouring* tenement hath of another, existing *in respect* of their several tenements, by which the *servient* owner is obliged *to suffer or not to do* something on his own land for the advantage of the dominant owner."

Goddard.

Goddard's definition runs thus: "An easement is a *privilege, without profit*, which the owner of one tenement has a right to enjoy *in respect of* that tenement in or over the tenement of another person, by reason whereof the *latter* is obliged *to suffer or refrain* from doing something on his own tenement for the advantage of the former."

Tudor.

The definition given in Tudor's Leading Cases on Real Property is as follows: "An easement is a *privilege without profit*, which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient tenement, to *compel the owner thereof* to *permit to be done, or to refrain from doing*, something on such tenement for the advantage of the former."

These definitions are so far defective that they include natural, as well as conventional easements. See Goddard, pp. 2 and 3. Besides, an easement, properly so called, is attached to two *heritages*, to one as a *benefit*, and to the other as a *burden*. Easements are acquired, *not* for the personal benefit of the dominant *owner*, but for the beneficial enjoyment of the dominant *heritage* by the dominant owner. Act V of 1882 shows this more clearly than any of these definitions.

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the term, and restrict it to servitudes appurtenant, *exclusive* of (what in English law are called) profits *à prendre*.[6]

Easements, according to the definitions given by Messrs. Gale and Goddard, are of two kinds: I. Natural Easements, better known as Natural Rights; and II. Artificial or Conventional Easements. But the term Easement is *commonly* used exclusively to denote the second class of easements. In Mr. Justice Innes' Digest of the Law of Easements, the term is defined in this its ordinary restricted sense.[7]

According to sec. 4 of the Indian Easements Act,[8] easements are *real* servitudes *including* profits *à prendre*. The context of the Act shows that the term is used to denote *conventional* servitudes only. 4th sense.

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[6] Easements are rights of *accommodation* as distinguished from those which are directly *profitable*. Easements (in the English law sense of the term) tend rather to the *convenience* than the *profit* of the claimant. A profit *à prendre* is so called because the claimant is entitled to *take* the profit for himself. A *rent* must be *paid* or *rendered* by the tenant. Profits lie *in prender*, rents lie in *render*. Convenience —not profit.

[7] In this Digest, rights of *vicinage*, *acquired* for the use of a tenement, are called servitudes; and servitudes, without a right to make a profit out of the substance of a neighbouring tenement, are called easements. Gale modifies his definition by saying that all easements originate in express, implied or presumed grants or agreements. Goddard also distinguishes easements created by the act of man from 'Natural Rights,' and throughout his work *uses* the term in its ordinary restricted sense. Gale and Innes, in their definitions of Easements, speak of them as if they were necessarily rights of *neighbours* or rights of vicinage. Under the Indian Easements Act, the servient tenement may *possibly* lie at a great distance from the 'dominant tenement.' (See Stokes' Anglo-Indian Codes, Vol. I, p. 880). Definitions compared.

[8] The Indian Easements Act (V of 1882), sec. 4, enacts as follows: "An easement is a right which the owner or occupier of certain land possesses as such, *for the beneficial enjoyment of that land*, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own." This definition, also, includes what are called 'natural rights' or 'natural easements,' but sec. 7 of the Act shows that 'natural rights' are not 'easements' within the meaning of the Act. Easements are *restrictions* of natural and other legal rights, *viz.*, of rights to advantages arising from the situation of one's land, and of the exclusive right to use and enjoy the same. Easements Act.

It will be observed that Messrs. Gale and Goddard call an easement a *privilege*, and in their definitions refer to the negative *duty* of the *servient* owner not to do something on his own land. Section 4, Act V of 1882, on the other hand, calls an easement a *right*, and refers to the *dominant* owner's *power* of doing something or preventing something being done on another's land. Messrs. Gale and Goddard define an easement from the servient owner's point of view. The Indian Legislature defines it from the dominant owner's point of view. Negative *duty*, and positive *right*.

An easement is defined by *some* authorities as a *privilege*, because it is *not* a right to the exclusive use of land, or to any corporeal interest in land. The grantee of an easement can *not* prevent another person,

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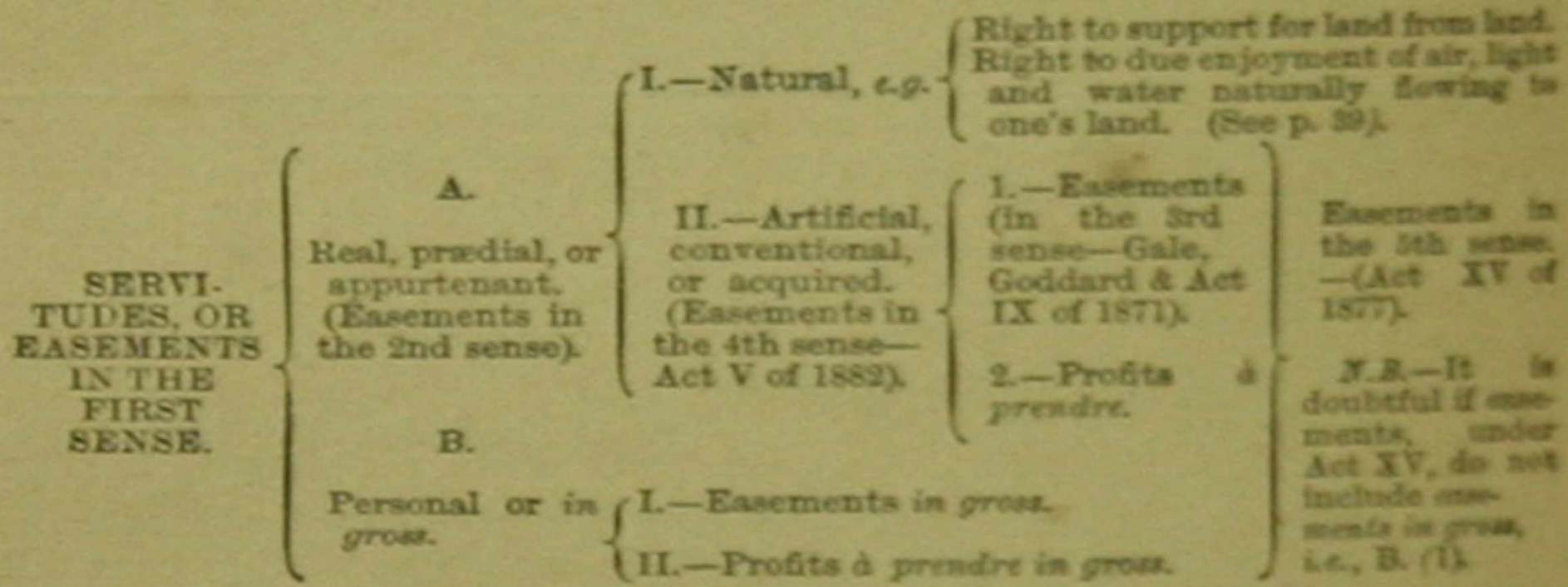
5th sense. Act (XV of 1877) lays down that in that Act, 'easement' *includes also* a right, not arising from contract, by which one person is entitled to remove and appropriate for his own *profit* any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another. And as profits *à prendre* may unquestionably be either real or personal according to English law, it has been held that profits *à prendre in gross*, not being expressly excluded by this definition, are easements within the meaning of Act XV of 1877.[a]

Table. The following table shows the several meanings of the term, and their relations to each other :—



In this Lecture I shall, in general, use the term 'easement' in the sense in which it is used in the Indian Easements Act, that is, as exclusive of servitudes *in gross* and 'natural rights,' and as inclusive of profits *à prendre* appurtenant. An easement, then, is a right *in rem* (other than a natural right) which the owner or occupier of certain land possesses, as such owner or occupier, for the beneficial enjoyment of that land, to do and continue to do something (including the taking of profits), or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. In *affirmative* easements the dominant owner has the right to *do* and continue to do something. In what are called *negative* easements he has the right to *prevent* and continue to prevent something being done. The servient owner is bound to *permit* the doing of that thing, or to *refrain* from doing that other

Easement defined.

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even a trespasser, from using the land, if such user does not impede him in the exercise of his right. An easement is *not* a right to the soil or a definite part of the soil, to the entire exclusion of the servient owner. (Goddard, 3rd Ed., pp. 5 and 6).

[a] Chundee *v.* Shib, I. L. R., 5 Calc., 945 ; 6 C. L. R., 269 ; Luchmeeput *v.* Sadaullah, I. L. R., 9 Calc., 698, 703. The *English* Prescription Act does not apply even to *profits à prendre in gross*. Shuttleworth *v.* Le Fleming, 19 C. B. N. S., 687 ; Gale, 6th Ed., 183.

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thing. The dominant owner is entitled to enjoy the right without disturbance by *any other person whatsoever*.

Easements distinguished from other rights.

In order to understand the nature of easements, it is necessary to distinguish them from rights of property, natural rights over neighbouring lands,[10] local customary rights *in re alieno solo*, licenses in respect of immoveable property, servitudes *in gross*, and other incorporeal rights.

From rights of property.

In one sense every easement may be regarded as a *right of property* in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest, in land which belongs to another whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement.[1]

Easements are rights *in rem* to put the land to *definite* uses.

An easement, as well as a right of property, is a right *in rem*.[2] A right arising out of a contract, being a right *in personam*, cannot be either a right of property or an easement. But a right *of property*, strictly so called, generally gives the party entitled an *indefinite* power of applying the land to *all* uses or purposes, save such as are inconsistent with his relative or absolute duties; while an *easement* is a right to *put* the land to uses of a *definite* class, or to *prevent* its being put to uses of a *definite* class.[3]

The owner's right of walking over his own land, of building upon it, of digging under it, of excluding others from his land, or of preventing them from interfering with the legal use of his land, are *ordinary rights of property*. These ordinary rights of property which are determined by

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[10] For instances of natural rights, not being rights over *land*, see pp. 6, 7 (notes), *supra*.

[1] *Per* Lord Watson in Dalton *v* Angus, 6 App. Cas., 740, 830.

[2] The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by *any other person*. (Section 32, Act V, 1882). In the case of a negative easement, it is *less likely* that a *stranger* (*i.e.*, a person other than the servient owner) should disturb its enjoyment.

An *obligation* arising out of a contract gives a right against a *determinate person* and his representatives, *e.g.*, against a particular *owner* of particular land. An *easement* gives a right over the *land* itself, and is enforceable against the whole world.

What duties and restrictions are not easements.

[3] Austin's Lectures, pp. 823, 836. Such relative duties as arise from *contracts* with the owners of neighbouring lands, and correspond to rights *in personam*, are not easements. *Absolute* duties annexed to property (such as that of preventing a house in a town from getting into a ruinous state) are also not easements. Restrictions imposed on the owner's rights of user by such general maxims as *sic utere tuo ut alienum non laedas* (use your property so as not to injure the rights of others), are similarly not 'easements.' These *general* restrictions apply to *all* heritages and are imposed for the general benefit of the *community*.

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the boundaries of the land are not 'easements' in any sense of the word.

Rights *in re alieno solo*.

An easement is a right *in re alieno solo*, in the land or tenement of *another*, or in land or tenement which is *not* the claimant's *own*.* When the owner of estate *A*, acquires a right of way over the adjoining estate *B*, he acquires an easement, but does not acquire a right of property in the servient estate *B*, though his right of walking over *B* is similar in many respects to the right of the owner of *B qua* owner to walk over his own estate. The owner of *A* can use *B*, *only* for the purposes for which he acquires the easement, while the owner of *B* can use it for *all* purposes save such as are inconsistent with his general or particular duties. (*Re sua* or *re propria* is opposed to *re aliena*).

But *all* rights *in rem* over *another's* property are not easements. The rights of the lessee or the usufructuary mortgagee over the demised or mortgaged land are not easements. They are *rights of property* in the land, modified by regard to the rights of the lessor or the mortgagor. Besides, such rights not being ancillary to the enjoyment of other lands of the lessee or mortgagee, are not *rights appurtenant*, as easements (proper) always are.

Julkur rights.

The *julkur* right of fishery in small and shallow rivers, the beds of which are recognized as the property of the claimant himself, is unquestionably a *right of*

No easement in one's own thing or property.

* Consider the maxim *Nulli res sua servit*. The rights and liabilities of the owners of property adjoining to a party-wall, when such wall is their *common property*, partake of the character of easements, but are *not easements*. When such wall belongs to *one* of the adjoining owners, it *may* be subject to an *easement* in the other, to have it maintained as a dividing wall between the two tenements. See Gale, 5th Ed., p. 513; 6th Ed., p. 454; Watson *v.* Gray, 14 Ch. Div., 192. In this Chancery case Fry, J., gives the four different senses of the term party-wall: (1) where the wall is *common property*; (2) where one *strip* of a wall (longitudinally divided) belongs to one of the neighbours, and the other to the other; (3) where the wall belongs to *one* of the neighbours, *subject to an easement* in the other to have it maintained; (4) when the wall is divided into two *strips* (longitudinally) and *each* strip is *subject to a cross-easement* in favor of the owner of the other strip. Akilandammal *v.* S. Venkatachala, 6 Mad., 112, gives an instance of the first sense of the term. See Radha Mohun *v.* Raj Chunder, 2 C. L. R., 377, 381, for an instance of the second sense of the term, but Mr. Justice Markby does not call the wall in that case a party-wall. In the case of a party-wall, in the second sense, each of the owners would be at liberty to pare away or even entirely to remove his portion, notwithstanding he other half might be unable to stand without the support of it. Where no *easement* has been *acquired*, the fact of the close union of the walls could only impose a duty of greater *caution* than might otherwise be required in removing the materials.

Party-wall: 4 senses of the term.

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property.[6] Julkur rights in navigable rivers also, are, often settled as separate estates, and sold for arrears of revenue, and such rights have often been (for purposes of revenue) granted by Government, extending over large estates, the property of persons other than the grantees of the *julkurs*.[7] Under Act IX of 1871, such rights, though incorporeal, were treated as interests in immoveable property, or proprietary rights.[7] As these rights are not appurtenant to other heritages or estates, they are *not easements* under the Indian Easements Act. And when these julkur rights entitle their holder to *all* the profits derivable from a river, lake, or other water in a tract of

Julkur rights.

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[5] See Beng. Reg. XI of 1825, sec. 4, cl. 4. Such a right of fishery is not an *easement*. It is what is called "a territorial fishery." Baban *v.* Nagu, I. L. R., 2 Bom., 19, 46.

[6] See Gour Huri *v.* Amirunnissa, 11 C. L. R., 9; Radha Mohun *v.* Neel Madhub, 24 W. R., 200; Moharanee Surnomoyee *v.* Digumbery, 2 Shome's Rep., 83, and Fadu *v.* Gour, I. L. R., 19 Calc., at p. 560.

It has been held by the Privy Council that in British India the Government has a freehold in the bed of navigable rivers, and in the land between high and low watermark. *Doe dem* Sheebkristo *v.* E. I. Company, 6 Moo. I. A., 267). Nevertheless, there *may* be exclusive rights in the riparian owners. (Bell *v.* Corporation of Quebec, 5 App. Cas., 84; Gale, 6th Ed., p. 213). It has been held that the Government has also the right of excluding the public from fishing in such rivers. The Government, however, has, in many instances, granted to private individuals the exclusive right of fishery in such rivers. (See Chunder *v.* Ram, 15 W. R., 212; see also Gour Huri *v.* Amirunnissa, 11 C. L. R., 9). Such a right must ordinarily be proved either by proof of a direct grant from the Government or by prescription. (Hori Das *v.* Mahomed, I. L. R., 11 Calc., 434, F. B.) Such exclusive right, being an infringement of the general rights of the public, may be acquired by a period of enjoyment which is sufficient for the acquisition of an easement against the Government. (Virese *v.* Tatayya, I. L. R., 8 Mad., 467). In England, the *public* can not, by prescription or otherwise, obtain a legal right to fish in a non-tidal river even though it be navigable. (Smith *v.* Andrews (1891), 2 Ch., 678). As regards the proprietorship of the bed of a river, there is no distinction, in India, between a *tidal* river, and a *navigable* river which has ceased to be tidal. (Nogendro *v.* Mahomed, 18 W. R., 113, P. C.)

Beds of navigable rivers.

Fishery rights in navigable rivers.

[7] Parbutty *v.* Mudho, I. L. R., 3 Calc., 276. In 2 Shome's Report, 93, julkur rights are treated as rights of property even as against the owners of the estates through which the *julkur* passes. But the grantee does not derive his rights from the owners of such estates, and such rights are not treated as fragments of *their* rights of ownership. As to the rights of the sovereign or the Government, and of the public in navigable rivers and the sea, see Baban *v.* Nagu, I. L. R., 2 Bom., 19; and Virese *v.* Tatayya, I. L. R., 8 Mad., 467. A *several fishery*, *i.e.*, an exclusive fishery in waters covering land which does not belong to the claimant, like all *exclusive* profits *à prendre*, but unlike most other easements, is, in English law, capable of being *trespassed* upon. See I. L. R., 2 Bom., 19, at p. 45. *Possessory* suits with respect to fisheries, ferries and watercourses *may* lie in Courts of *Equity*. (See Fadu *v.* Gour, I. L. R., 19 Calc., pp. 556, 560).

May incorporeal rights be *trespassed* upon.

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country, subject to *no restriction* in favor of the owner of the bed or subsoil,. they are hardly servitudes in the ordinary sense of the term.[8] The fact that *julkurs* are often described as *mehals* or estates, goes, to a certain extent, to show that they are generally treated as rights of *property*.[9]

Julkur rights.

Besides, as these rights are- transferable and capable of being let out to tenants, *independently* of *other* property, they are not easements within the meaning of the Transfer of Property Act.[10] Where the owner of the bed of a river or lake grants to another *definite* rights over his water, or where *definite* rights are acquired by prescription against the owner, such rights are servitudes and not rights of property.

The grant of a several (*i.e.*, exclusive) fishery for only one *particular* species of fish, can give the grantee no property in the water or in the subsoil. In England, the grant of an exclusive fishery, (in non-tidal waters) without any restriction as to the kinds of fish to be taken, specially where the grantor reserves a rent, *primâ facie* includes the soil.[1] Where the grant of a *julkur expressly* conveys (besides

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[8] There are authorities for the proposition that an *indefinite* claim to *destroy* the subject-matter cannot be supported as a profit *à prendre in alieno solo*. See Goodman *v.* Mayor of Saltash, 7 App. Cas., 633, 646. An *unlimited* profit *à prendre* on another's soil cannot be claimed by *prescription*. (Branson's Digest of unreported Bombay High Court Judgments, 399). No profit *à prendre in alieno solo* can be claimed by *custom*, in England. (7 App. Cas., at p. 648).

[9] A fishery is a right which is recognized as *property* in this country. Bhagiram *v.* Abar Dome, I. L. R., 15 Calc., 388, 399.

[10] See sec. 6, Act IV of 1882 It is apprehended that even under Act XV of 1877, such *indefinite* aqueous rights are rights of *property*, and not profits or easements. It has been held that the interest of a lessee of a julkur or sayer mehal is not an interest in land within the meaning of the District Road Cess Act (Beng. Act X of 1871). See David *v.* Grish, I. L. R., 9 Calc., 183. A common of fishery over a particular part of the sea claimed by the fishermen of a particular village being an exclusive private right of fishery is immoveable property within the meaning of sec. 9 of the Specific Relief Act, 1877. (Bhundal *v.* Pandol, I. L. R., 12 Bom., 221). But a majority (of 3 against 2) of the Judges in Calcutta have held *otherwise*. (Fadu *v.* Gour, I. L. R., 19 Calc., 544). A mere *julkur* right is not *tangible* immoveable property within the meaning of sec. 145 of the Crim. Pro. Code, 1882. (Anundomoyee *v.* Shurnomoyee, I. L. R., 13 Calc., 179).

Is a private right of fishery, immoveable property?

According to English law the owner of a profit *in alieno solo* (whether in gross or appendant to land) may get the benefit of his profit by selling or letting an interest in it, for a longer or shorter term, and during the term the transferree has an *irrevocable license* to take so much of the profit. See Goodman *v.* Mayor of Saltash, 7 App. Cas., 658. But cf. Gour Huri *v.* Amirunnissa, 11 C. L. R., 9.

Lease of a profit,—an irrevocable license.

[1] Brown, 179, 190; Marshall *v.* The Ulleswater Steam Navigation Company, 3 Best & Smith's Reps., p. 732.

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exclusive rights of fishing) *other* purely aqueous rights (such as the gathering of rushes and other vegetation which arise from and are connected with water), it may be very well conceived that, if in such cases the right to the *soil* were implied in the grant, it would be wholly unnecessary to *specify* these particular rights; if the grantee were the owner of the land, he would, as a matter of course, be entitled to everything on it. (24 W. R., 200). However, although a *julkur* does not *necessarily* imply any right in the subsoil, the fact that a *julkur mehal* is sometimes called a *mouza* shows that the *bandabasta* or settlement of a *julkur may* include the soil.[2]

Easements distinguished from natural rights.

Besides the *ordinary* rights of property which are *determined by the boundaries of the land*, there are certain *accessorial* rights, *incident* to the ownership of land, which entitle the owner to enjoy the natural advantages arising from the situation or position of the land in relation to *other lands in its vicinity*. The right of every owner of land that such land in its natural condition shall have the support (vertical and lateral) naturally rendered by the subjacent minerals and adjacent soil of another person, the right of the owner of higher land that the fall of its surplus rainwater upon the adjacent lower ground shall not be obstructed by the owner of the latter, the right of every riparian owner to the uninterrupted flow (subject to lawful use by others) of a natural stream[3] in its natural state, are, when recognized by custom or

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[2] Radhamohun *v.* Neel Madhub, 24 W. R., 200; David *v.* Grish, I. L. R., 9 Calc., 183; Rakhal *v.* Watson, I. L. R., 10 Calc., 50.

Riparian rights.

[3] See Illustration (*h*), sec. 7, Act V of 1882. As to the natural right to use the water of a natural stream or lake, by riparian proprietors for their household purposes, for watering their cattle, and to some extent for irrigating their land, or for the purposes of any manufactory situate thereon, see Illus. (*j*) of the same section. The right must be exercised subject to the conditions, *viz.*: (*i*) that the use is reasonable; (*ii*) that it is required by the riparian proprietors for their purposes as owners of riparian land; and (*iii*) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream, in the exercise either of their natural right, or right of easement, if any. (Perumal *v.* Ramsami, I. L. R., 11 Mad., 16). The right belongs to the *occupant* of the river-bank, whatever the nature of his tenancy. (Collector *v.* Shamji, I. L. R., 7 Bom., 209).

It may be here observed that the natural right of a riparian proprietor to the use of a stream does not depend on the ownership of the soil of the stream; hence a riparian owner on a navigable and tidal river, in addition to the rights connected with navigation, to which he is entitled as one of the public, retains his rights as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation. (Tudor, p. 195; Lyon *v.* Fishmonger's Company, 1 App. Cas., 162).

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the law of the land, instances of such *accessorial* rights. These rights, which are very like easements proper, are generally called 'natural rights,' and are sometimes described as 'natural easements.'[4]

Light, air and water.

The right of every owner of land to so much light and air as pass *vertically* thereto is an ordinary right of property, based upon the maxim *cujus est solum, ejus est usque ad cœlum et inferos*.[5] The right to light and air in its natural state transmitted *laterally* over and from a neighbouring estate, differs from the right to natural streams of water. The first and paramount right which the ownership of land seems to give, is that of doing what the owner pleases thereon, either by building or otherwise; and therefore he has by such paramount right the power of obstructing the lateral passage of light and air from over his own land to adjacent lands.[6] But the owner of such lands may *acquire* (as an easement) the right to prevent such obstruction, by grant or prescription. The right to light and air transmitted *laterally* is, therefore, not a *natural right*, unless recognized as such by special customs. Support to that which is *artificially* imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must

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Riparian rights.

As to the difference between the ordinary use of the water of a flowing stream (for original purposes), and the extraordinary use of the water (for manufacturing or irrigation purposes), see Miner *v.* Gilmour, 12 Moore, P. C., 131, 156; and Ormerod *v.* Todmordon Mill Co., 11 Q. B. D., 155, 168, 172; Sardown *v.* Hurbans, 11 W. R., 254.

Any user of water by a *non-riparian* proprietor, even under a license or a grant of an easement from a riparian owner, is wrongful if it sensibly affects the flow of the water by the lands of other riparian owners. Ormerod *v.* Todmordon Mill Co., 11 Q. B. D., 155.

Rainfall and drainage water.

As to the natural right of discharging rainfall by natural means through a natural watercourse passing through another's land, see Khetter *v.* Prosonno, 7 W. R., 498. As to the flow of surface drainage water from higher lands, see Hameedunnissa *v.* Ananda Moyee, W. R., Special Number, F. B., 25. As to water naturally falling on one's lands running off over adjoining land of a lower level, see Kopil *v.* Manick, 20 W. R., 287; Abdul Hakim *v.* Gonesh Dutt, I. L. R., 12 Calc., 323; and I. L. R., 8 Calc., 463. As to the right of a superior riparian proprietor to have the water from his lands drained into the stream without obstruction, see Subramaniya *v.* Ramchandra, I. L. R., 1 Mad., 335.

[4] See the judgment of Lord Selborne in Dalton *v.* Angus, 6 App. Cas., 740; Goddard, p. 3, note (*c*). Easements proper are also *accessorial* rights trenching upon the liberty of others, but they are *acquired* rights, and *not incident* to the ownership of land.

[5] "Whose is the soil, his it is even to heaven and to the middle of the earth."—*Wharton*.

[6] Broom and Hadley, Vol. II, p. 40; Goddard, p. 32. A right to light and air, transmitted over and from a neighbouring heritage, is not in any sense an inherent right of property. (Gokal *v.* Radho, I. L. R., 10 All., 358, at p. 377).

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in each particular case be *acquired*, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it. But the right to support of *buildings*, when *acquired*, is the same in character as the *natural* right to support of *land*.[7]

Easements are rights in *addition* to ordinary and natural rights.

An easement, in the words of Mr. Gibbons, is rather a fringe to property than property itself. So far as the *dominant* owner is concerned, it is something *superadded* to the ordinary and natural rights of property. It is a privilege *exceeding* what would, of common right, belong to the owners of lands and tenements as such. It is some advantage derived by one tenement from or upon a neighbouring tenement, *greater* than 'what would naturally and ordinarily belong to the former.' 'Natural Rights' (that is, the accessorial rights which are sometimes called 'natural easements'), like the ordinary rights of property, are secured to the land-owner by the common law of the country.[8] They are inherent in the land *ex jure naturæ*, of *natural* right. They owe their origin to the disposition and arrangements of Nature, are, very often, more purely negative[9] in their character, and though susceptible of being suspended by adverse easements, are incapable of being extinguished permanently, inasmuch as they *revive* on the extinction of such easements.[10]

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[7] See Angus *v.* Dalton, 6 App. Cas., 740, at p. 792.

Ordinary and natural rights.

[8] See Goddard, pp. 2, 3. In the report of the Law Commission on the codifying bills, 1879-80, the ordinary rights of property as well as the accessorial natural rights are called 'natural rights.' In the Statement of Objects and Reason appended to the Easements Bill both these classes of rights are described as "rights incidental to the ownership of immoveable property."

[9] But the natural right to support of land, and the right to discharge surplus rain-water, *partake* of the character of *positive* easements.

Ways, profits, and rights in gross—not natural rights.

It may be further observed that there can be no "natural rights" *in gross* over another's land, and that there are no *natural* profits *à prendre*, in respect of another's land. The right of the public to fish in the sea is, however, sometimes, treated as a *natural* profit *in gross*. But such a right is neither a *servitude*, nor a right of *property*. See Baban *v.* Nagu, I. L. R., 2 Bom., pp. 51, 52, and 53. There are also no *natural* rights of way. (Goddard, 2nd Ed., p. 68; 3rd Ed., p. 96).

[10] See Gale, 5th Ed., pp. 2, 3; 6th Ed., pp. 4, 5; Goddard, 2nd Ed., p. 356; 3rd Ed., p. 485. *A's* natural right to build on his own land may be suspended by *B's* easement to the access of light, but it will not be extinguished thereby. A natural right (as well as an easement) may, however, be *abandoned* by the dominant owner. (Khetter Nath *v.* Prossunno, 7 W. R 498).

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As regards the *servient* heritage, Easements are *restrictions* of the 'ordinary rights' of property, or of the accessorial rights called 'natural rights."[1]

Easements must be acquired.

Easements are not given to *every* owner of land, but are created by *special* human acts or incidents. They may be either positive rights to do something on another's land, or negative rights to prevent something being done on his land. Natural rights need no age to ripen them, nor any particular incident to create them. A 'natural right' is an incident of property, not acquired by long and continuous user and in no way dependent on the consent, express or implied, of the owner of the servient heritage. It is, in the words of Mr. Justice Innes, "a right of vicinage attaching to the situation of the tenement." Easements are *artificial* or *conventional*, and must be *acquired* by grant, prescription or other means.

(Natural rights are not acquired)

Nuisances, and disturbances of easements.

Annoyances caused by infringements of natural rights are called (private) *nuisances*. Those caused by infringements of easements are called *disturbances*. Repeated acts amounting to *nuisances* may, in course of time, confer prescriptive easements inconsistent with natural rights.[2] An easement being a right *in alieno solo*, the *relief* awarded in the case of a disturbance should certainly not be more extensive than what is *necessary* to its beneficial enjoyment.[3]

Easements and licenses.

A lease of *B's* land to *C* gives *C* an interest, or a (limited) right of property in *B's* land. It gives *C* the *exclusive* enjoyment of the land during the term. An easement acquired by *C* over *B's* land does not give *C* any right *to B's* land or *to* any *corporeal* interest therein; but *C* acquires an irrevocable incorporeal right over *B's* land to *do* something or to *prevent* something being done on such land, *for the beneficial enjoyment of C's own lands*. Under particular Acts (*e.g.*, Act XIV of 1859 in India, and the Statute of Frauds in England), an easement may be treated as an *interest* in land, but a mere license is

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[1] See sec. 7, Act V of 1882, which gives ten instances of these two classes of rights.

[2] Gale, 5th Ed., pp. 482, 633; 6th Ed., pp. 431, 551; Innes' Digest, 54. In the English law, the term "nuisance" is applied to *both* classes of annoyances. Strictly speaking, the term should be confined to the *first* class of annoyances.

If the transmission of impure air from *A's* land is submitted to for twenty years by his neighbour *B*, *A* acquires an easement inconsistent with *B's* natural right.

[3] Perumal *v.* Ramsami, I. L. R., 11 Mad., 16, at p. 19

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never so treated. A license is a right *in gross* granted to the licensee to *do*, upon the licensor's *immoveable* property,[4] something which would be otherwise unlawful. This right of the licensee (even when obtained for a valuable consideration) is revocable at the pleasure of the licensor (except under certain circumstances),[5] is not

"License," under Act V of 1882.

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[4] See Ch. VI, Act V of 1882. There *may* be a license (according to English authorities) to do a thing upon the licensee's *own* land, *e.g.*, to build on his land so as to obstruct the licensor's easement over such land. This, however, is more properly the *release* of a servitude, than a *license* to do something. (Michell, p. 141). A loan of specific *moveable* property often amounts to a mere license. A license to practise a profession has nothing to do with any *property*. None of these are 'licenses' within the meaning of Act V of 1882.

[5] A license *may* be called a *right*, because it has a continuing incorporeal existence *so long* as it is not revoked by the grantor, and also because the licensee's right to enjoy the privilege is not absolutely at the mercy of strangers (see Goddard, p. 4). But a mere license not being a right *in rem*, a mere licensee cannot maintain in *his own name* an action for infringement against a *stranger*. (Hill *v.* Tupper, 2). (H. and C., 121; Kensit *v.* G. E. Railway, 27 Ch. Div., 122; Gale, 6th Ed., p. 2). "A license merely excuses the act when done, is retrospective, and not prospective, in its operation; it begets no obligation on the part of the licensor to keep it in force, and may, therefore, be revoked by him at any moment." (Phear on Rights of Water, p. 58). But a license is not revocable *if* it is *coupled with an interest* (*i.e.*, coupled or connected with, or annexed to, a valid transfer of a right of property), or if the licensee has *executed* a work of a permanent character and incurred expenses. (See sec. 60, Act V of 1882). A license to do acts which consist in repetition, *e.g.*, to walk in *A's* park or to fish in *B's* tank cannot cease to be *executory* (*i.e.*), cannot be wholly *executed*. Both the benefit and the burden of an *easement* are *annexed* to *land*, while a *license*, unless coupled with a grant of property, is *personal* to both licensor and licensee. (Gale, 6th Ed., p. 2).

Naked license.

License coupled with an interest.

If a license is part of a transaction, whereby a lawful interest in some (moveable or immoveable) property, besides that which is the immediate subject of the license, is conferred on the licensee, and the license is necessary to his enjoyment of that interest, the license is said to be "coupled with an interest." (See Pollock on Torts, 2nd Ed., p. 323). A license to hunt in a man's park, *and carry away the deer killed to his own use* is a license coupled with an interest in the deer killed. Where a sale of goods was coupled with a license to leave them on the vendor's land and to remove them afterwards, it was held that the license could not be revoked. (See Michell, p. 145). Unless a different intention is expressed or necessarily implied, (as, for instance, where the license is to B "and his assigns," or where the license is coupled with such an interest as entitles the grantee to search minerals and carry away the ore found), a license is not transferable by the licensee. (Sec. 56, Act V; Muskett *v.* Hill, 5 Bing. N. C., 614; 1 Stokes, 924). The grant of a right to trap elephants upon the grantor's lands and carry them away does *not* amount to an easement or *interest in the land*, but is only a *license*. (Chandayil *v.* Thandupurakal, 3 Mad. L. J., 27). Such a grant like most grants of mining rights do not amount to a lease, or to an

License, generally, not transferable.

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enforceable against the licensor's transferee, and cannot, in general, be transferred by the licensee, or exercised by his servants or agents.[e] Generally speaking, a license is a mere *voluntary* suspension of the licensor's right to treat certain acts as wrongful. (See Pollock on Torts) Where a *consideration* has been paid for the license, the revocation of it may amount to a breach of contract, for which a suit for *compensation* only, will lie. (See sec. 64, Act V of 1882). A right of easement cannot be revoked at the will and pleasure of the grantor.[f] It is available against all the world, and may be transferred by the party entitled thereto along with the land to which it is appurtenant. A servitude may be either appurtenant, or in gross; an easement is a right appurtenant, while a license is a right *in gross*. An easement may be positive or negative, while a license is only positive. An easement is generally permanent, while a license is generally temporary. Besides, a license to do acts may be determined *individually* as well as by class, while an easement is a right to put the land generally to uses of a definite *class*, and not merely to uses determined specifically or individually.[g] *A* may have *B's* permission or license to enter or walk over *B's* land once or twice, but such right over *B's* land cannot amount to an easement or a servitude. The privilege of doing *one* particular act on the grantor's land *may* be a license, but cannot be a servitude or an easement. The licensee is entitled to do *or* to continue to do something. But the dominant owner is entitled to do *and* to continue to do something, or to prevent *and* to continue to prevent something being done, upon the servient heritage.[h]

Easements distinguished from licenses.

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interest in *land*, but being coupled with a grant of *chattels* (metals found) is irrevocable. (Doe *v.* Wood, 2 B. & Ald., 724). In the case in 3 Mad. L. J., it was also held that the license there was not *assignable*. *But* see Muskett *v.* Hill, and 1 Stokes, 924.

Where *P* consented to allow *R* to use *P's* land as a privy, such consent or license not being coupled with the transfer of any interest in the land, it was held that the license was revocable, and that *R* might, on eviction, sue for compensation, but not for an injunction. (Prosonno *v.* Ram Coomar, I. L. R., 16 Calc., 640).

[e] In British India, under Act V of 1882, a license to attend a place of public entertainment (if not expressly or impliedly non-transferable) is an exception to this rule. (See sec. 56.) A license to enter a theatre is determined or revoked by an assignment of the theatre. (Richards *v.* Harper, L. R., 1 Exch., 199).

Tickets for admission to public entertainments.

[f] In one case only, *viz.*, where the grantor reserves a power to revoke, an easement may be revoked by him—Sec. 39, Act V of 1882.

[g] Austin, Lecture, 49.

[h] To do and to *continue* to do a thing does not mean the incessant or constant doing of the thing. Use perpetually recurring at certain or

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Easements distinguished from "customs."

An easement (properly so called) belongs to a *determinate* person or persons in *respect* of his or their *land*. A congeries of persons, such as the inhabitants of a locality, unless incorporated as a determinate juristical person, cannot claim an easement. A *customary* right belongs to no *individual* in particular. It may be enjoyed by any who inhabit a particular *locality* for the time being, or who belong to the particular *class* entitled to the benefit of the custom.[10] Easements are, so to speak, *private* rights belonging to *particular persons*, while customary rights are *public* rights annexed to the *place* in general. A custom for the inhabitants of a particular village to dance or to have horse-races on the land of an individual, or to go on a close and take water from a spring, and other customs, may be valid, if not *unreasonable* in their character.[1] But the customary right of even an *individual* of the class is not an easement, unless by virtue of the csutom he becomes entitled to an *independent* right *in respect of his estate* situated in the locality to which the custom belongs, and the right is *bene-*

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uncertain intervals is sufficient. The dominant owner should have a right to put the subject to *definite uses*, but for an *indefinite number* of times. Austin, Lecture, 49.

[10] Goddard, 2nd Ed, p. 17 ; 3rd Ed., p. 24.

[1] Gale, 5th Ed., p. 20 ; 6th Ed., p. 3. In Sowerby *v.* Coleman, L. R., 2 Exch., 96, a custom for the inhabitants of a parish to exercise and train horses at *all* seasonable times of the year, in a place beyond the limits of the parish, was considered unreasonable.

"Customs" are rights in gross.

These "customs" (when valid) are rights *in gross*, and therefore *not easements properly* so called. A customary right of this nature may be claimed by the inhabitants of a *certain district*, and cannot (technically) be claimed on behalf of the *public* at large. (Coventry *v.* Willes, Gale, 21 ; 44 Ch. D., 110). A right claimed by *all the villagers* to a profit *à prendre* over another's land cannot exist by *custom* or *prescription*. Such a claim by an *indeterminate* number of persons is *unreasonable*. (See Lord Rivers *v.* Adams, 3 Exch., 361 ; and Luchmeeput *v.* Sadaullah, I. L. R., 9 Calc., 698). Such a custom is unreasonable, because the possible increase of the number of claimants might practically operate to divest the owner of all the profits of his property. (Secretary of State *v.* Mathurabhai, I. L. R., 14 Bom., 213). Prescription is *personal*, custom is *local*. A *variable* body of persons, if not incorporated, cannot claim by *prescription* either an easement or a profit *à prendre in alieno solo*. *Such* a body may claim an *easement* by *custom*, but not a *profit à prendre in alieno solo*. (See Goodeve's Real Property, 2nd Ed., p. 363). Easements as well as *profits à prendre* may be claimed by *prescription* ; but the latter cannot be claimed (in England) by *custom* unless in two or three exceptional cases, such as rights of *copyholders* to common in the lord's demesne, or to dig sand within their tenements ; rights to estovers in royal forests, and rights of tinbounders in Cornwall. (Encyclopædia Brittanica ; Goodman *v.* Mayor of Saltash, 7 App. Cas., 633, 648 ; Digby, pp. 158, 165, 248). Mr. Digby, at p. 150 of the 3rd Edition of his History of Real Property Law, observes that the English law is in this respect somewhat inconsistent. See note 3, *infra*.

Individuals, or variable bodies, claiming easements or profits by custom or by prescription.

Three exceptional customary profits.

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ficial to the occupation or enjoyment of *such* estate.' It may be doubted if some of the cústomary rights mentioned above can pcssibly be rights to do something for the *beneficial enjoyment* of any dominant *heritage*. A customary right to hold a festival on another's land (*Ashraff* v. *Jogan*, I. L. R., 6 All., 497), or a customary right to bathe in another's tank (*Channanum* v. *Manu*, 1 Mad. L. J., 47) not being a right to do something for the beneficial enjoyment of any land, is not an *easement*, but a right *in gross*, which is saved by sec. 2 of Act V of 1882. (See Michell, p. 87).

"Customary easements."

The illustrations to sec. 18 of Act V of 1882 show that an independent right to graze one's cattle on the common pasture or to prevent interference with privacy, may be acquired, in virtue of a local custom, as an easement in respect of some property within the locality to which the custom applies. An easement of this sort is called 'a customary easement.'[3]

Easements distinguished from rights *in gross*.

An easement cannot be severed from the land to which it is annexed and made a *right in gross*.[4] It cannot be transferred *apart* from the dominant heritage.[5] In order to constitute a

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[2] Goddard, 2nd Ed., pp. 19, 20, and 13 ; 3rd Ed., pp. 26, 27.

[3] In England, a *variable* and *fluctuating* body, like the inhabitants of a certain locality, cannot claim a profit *à prendre in alieno solo* even by custom. Lord Fitzgerald questioned the wisdom of the English law on this subject as laid down in Gateward's case. (See Goodman *v.* Mayor of Saltash, 7 App. Cas., 658, at p. 669). The Calcutta High Court in Luchmeeput *v.* Sadaullah, I. L. R., 9 Calc., 698, considered such a custom in respect of *fishery* rights against an *individual* unreasonable, and therefore invalid. But customary rights of *grazing* against *Government* may not be unreasonable, I. L. R., 14 Bom., 213. Illustration (*a*) of sec. 18, Act V of 1882, would seem to recognize such a claim, if it be *appurtenant* to some *land* of the claimant in the locality. Customary rights in or over immoveable property, though not appurtenant to other immoveable property, are saved by sec. 2 of Act V of 1882.

Covenants running with the land.

[4] Goddard, 2nd Ed., p. 10; 3rd Ed., p. 11. The *benefit* of an easement passes *with* the dominant tenement, as the *burthen* of it passes *with* the servient. (9 L. R., Ch. App., 474). In this respect, easements, in general, bear a strong *resemblance* to "Covenants running with the land." The *burden* of covenants, however, does not (at Common Law) run with the land, so as to bind an assignee, *except* in cases between landlord and tenant. A purchaser taking with *notice* of a *restrictive* covenant is bound by it in *Equity*. (See Austerberry *v.* Corporation of Oldham, 29 Ch. Div., 750). Even where a particular covenant (for the beneficial enjoyment of lands) does run with the land at Common Law, or is binding on assignees in Equity, it does not create an easement, unless an action for a tort can be maintained for a breach of the covenant. In ordinary cases an action for breach of *contract* only will lie. (Gale, 5th Ed., p. 85 ; Goddard, 4th Ed., p. 108).

[5] Sec. 6, Act IV of 1882. But the owner of one heritage may *grant* an easement *per se* to the owner of a neighbouring heritage. An easement may be granted separately, and apart from any conveyance

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valid easement, there must exist two tenements or heritages —the servient and the dominant.[6] There must be the land *a qua* and the land *in qua*. If a person prescribes for an easement, he must claim it 'in a *que* estate' (that is in himself and those whose *estate* he holds[7]), and claim *such things only* as are incident or appurtenant to lands, for it would be absurd to claim anything as an appurtenance to an estate with which the thing claimed has no connection.[8] The easement (whether acquired by grant or prescription) must be for the beneficial *enjoyment* of the dominant *heritage*, and not for some *general* benefit of its *owner*, *unconnected* with the enjoyment of such *heritage*.[9] The expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity.[10] A right to let off, upon the neighbouring land, water which had been rendered noxious by a particular *use* thereof *on the dominant premises*, may be acquired as any other easement; but a claim by the owner of a house to discharge foul water *simpliciter* cannot be claimed as an easement.[1] A right to cut wood on another's land is not an easement, unless the wood when cut is to be used on or for the benefit of a dominant heritage.[2] Where an alleged easement has no connection with the enjoyment of a particular heritage, it is a servitude *in gross*—a personal

Easements distinguished from rights *in gross*.

Rights *in gross*, not assignable.

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of the would-be dominant heritage, when such heritage *already* belongs to the grantee. An easement amounting to a profit *à prendre* may, according to English law, be severed from the dominant heritage, and enjoyed *in gross*. (Neill *v.* Duke, 8 App. Cas., 135, at p. 153).

[6] "Probably, however, in the English, as in the Civil law, the grant of an easement in respect of a house *about to be* built or purchased, by the grantee, would enure as such." (Gale, 5th Ed., p. 11; 6th Ed., p. 10). In the Roman law, the dominant heritage was called the "*locus superior*," and the servient heritage was called the "*locus inferior*." (Markby, 3rd Ed., sec. 409).

[7] Not in himself and his *ancestors*. An easement passes *with* the dominant estate to the owner of such estate. A servitude *in gross* may pass to the heirs and legal representatives of the person who acquires it. In the Roman law personal servitudes did not pass to the heirs. (Hunter, 396).

[8] Wharton's Law Lexicon.

[9] Broom and Hadley, Vol. II, p. 33; Gale, 6th Ed., p. 12; sec. 21, Act V of 1882; Bailey *v.* Stevens, 31 L. J. C. P., 226.

[10] *A's* stream supplying *B's* fountains is a mere amenity.

[1] Broom and Hadley, Vol. II, 34; Wright *v.* Williams, 1 M. & W., 77. A servitude cannot be merely burdensome—it must be beneficial to the possessor. (Hunter, 421).

[2] Goddard, 2nd Ed., p. 14; 3rd Ed., p. 18; Illustration (*d*), sec. 4, Act V of 1882. A right to cut wood on another's land, and to carry it away for *sale*, *is not* a right *appurtenant to land*.

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right which cannot be *assigned*[2] to another person, except perhaps, in the case of a *profit*, by the *ordinary conveyances* known to the law. (*Bailey* v. *Stevens*, 31 L. J., 226).

Public ways are not easements.

Public rights of way which *all* persons in the empire are entitled to use at their pleasure, *irrespectively* of the ownership of any *estate* are *rights in gross*, and not appurtenant. Besides, a public road or highway is, in fact, a *dedication* to the public of the *occupation* of the surface of the land for the purpose of passing and repassing, while in the case of an ordinary easement, the occupation remains with the owner of the servient heritage, subject to the easement.[4] The ordinary rules for the acquisition of easements by positive prescription do not apply to public roads or highways.[5] The evidence of user offered by

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[2] Ackroyd *v.* Smith, 10 C. B., 164. Goddard, 4th Ed., p. 9; L. R., 8 Ch. Ap., p. 655. A profit in gross might probably be created by agreement, and be *assignable* as a license coupled with a grant. (Gale, 6th Ed., p. 13). Assuming that a profit *in gross* is capable of being assigned, it can *only* be assigned (by the person who has acquired it) by the *ordinary conveyances* known to the law. (Bailey *v.* Stevens, 31 L. J., C. P., 226; Goddard, 4th Ed., p. 18).

[4] See Lord Cairn's judgment in Rangeley *v.* The Midland Railway Company; Goddard, 2nd Ed., pp. 8, 68; 3rd Ed., pp. 9, 97; Illustration (*e*), under sec. 4, Act V of 1882; Branson's Digest of Unreported Bombay Judgments, 90.

Public. No prescription or custom.

[5] The Roman law required *immemorial* prescription in the case of *public* roads. The *public*, as such, cannot claim any right by prescription or custom. (Smith *v.* Andrews, 1891, 2 Ch., pp. 689, 700). The Indian Easements Act does not apply to the rights of the public, for the further reason that such rights are *not appurtenant*.

Highways, thoroughfares, and towing-paths.

The term 'highway' includes all public ways. A highway stopped at one end would cease to be a 'thoroughfare.' (See 2 Smith's Leading Cases, notes to Dovaston *v.* Payne). A cul-de-sac, or street closed at one end may under certain circumstances be a highway. (See Rourke *v.* Davis, 44 Ch. Div., 110). A way to a parish church or to the common fields of a village, which terminates there, is not a public way. In Chunilal *v.* Ramkishen (I. L. R., 15 Calc., 460, F. B.) Wilson, J., points out that there are three classes of ways, *viz.*: (1) private ways, (2) village ways, (3) public ways. Private rights of way are vested in particular individuals or the owners of particular tenements. Village ways, &c., belong to *certain classes* of persons or certain *portions* of the public. They have their origin, commonly, in custom. Although *public* rights of way are *not* easements, several or many persons of a class may have rights of way over one and the same road, which are *easements*. (Goddard, 4th Ed., 102). Sec. 30, Civil Procedure Code, does not apply to suits in respect of *private* ways. (Jawahir *v.* Akbar, I. L. R., 7 All., 178) nor to suits in respect of *public* ways. (Adamson *v.* Arumugam, I. L. R., 9 Mad., 463). Sec. 30 does apply to village ways (I. L. R., 15 Cal., 460) and to village fishery rights. (Bhimdal *v.* Pandol, I. L. R., 12 Bom., 221. But cf. Venkatachala *v.* Kuppusami, I. L. R., 11 Mad., 42). Public ways, in the *full sense* of the term, exist for the benefit of *all* Her Majesty's subjects. (But a way claimed for all the inhabitants of a large city has been held to be a public way. Gale, 5th Ed., pp. 338, 339; 6th Ed., p. 306). Where the privilege to use a

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a party in support of his claim to use such roads as *one of the public*, need not prove a twenty years' enjoyment. It is sufficient if acts of user by the public are shown to have been acquiesced in by the owner or owners of the land over which the roads pass, and that those acts are of such a character as to warrant the inference that the owner or owners intended to make over to the public the right

Public ways.

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road is enjoyed only by one particular section of the community, or by the inhabitants of two or three villages, and *not* by others, the road is not a public road. (Sham *v.* Monee, 25 W. R., 233; Fattehyab *v.* Mohammed, I. L. R., 9 All., 434). "Once a highway always a highway." (2 Smith's Leading Cases, p. 151). The public cannot release their right to a highway. (Dawas *v.* Hawkins, 8 C. B. N. S., 858; Banning, p. 278). Even Municipal Commissioners, in whom highways are vested, cannot stop a highway. (Empress *v.* Brojonath, I. L. R., 2 Calc., 425). In the Bombay Presidency the *soil* of public roads is vested in the Secretary of State. (Act V of 1879, Bombay, sec. 37). The case is *probably* much the same in Calcutta, and *perhaps* also in the mofussil *Municipalities* in Bengal. The soil of public streets is vested in the Commissioners. (See sec. 189 of Bengal Act IV of 1876, sec. 202, Bengal Act II of 1888, and sec. 30, Bengal Act III of 1884). There is no such law applicable to the *Province* of Bengal *generally*. (Chuni Lal *v.* Ramkishen, I. L. R., 15 Calc., 460, 467, F. B.) It has been *held*, however, that under sec. 32 of the Bengal Municipal Act (Bengal Act V of 1876) the subsoil of roads in any Municipality did not vest in the Municipality. (Chairman, Noihaty Municipality *v.* Kishori Lal, I. L. R., 13 Calc., 171). Sec. 10 of Bengal Act III of 1864, also, it has been held, did not deprive a person of any right of private property that he might have had in land used as a public road, nor did it vest the subsoil of such land in any Municipality, and when such land was no longer required as a public road, the owner was entitled to claim its possession. (Madhu *v.* Promoda, I. L. R., 20 Calc., 732). The word "roads" in the N. W. P. Municipal Act, XV of 1873, also, does not include the subsoil. (See Nihal Chand *v.* Azomatali, I. L. R., 7 All., 362). There is a *presumption* that a highway or waste land adjoining to it *belongs* to adjoining owners. (*Ibid.*) Persons passing along a public highway, do not thereby acquire a right to shoot therein. (Smith *v.* Andrews, 1891, 2 Ch., 672, at p. 696). Where an obstruction to a public road causes some special or peculiar inconvenience of a substantial kind to the plaintiff, the Civil Court may order the removal of such obstruction. (Rajkumar *v.* Sahebzada, I. L. R., 3 Calc., 20). It has been held that a suit of the converse kind brought to *negative* the existence of a highway is also maintainable, and that the decision of the criminal authorities is not final or conclusive on a question of title. (Chuni Lal *v.* Ramkishen, I. L. R., 15 Calc., 460, F. B.) The dedication of a highway *may* be *subject* to certain rights of the owner or of others. (Gale, 5th Ed., p. 484). As to the *right* of the owner to the *soil*, see Jaggomoni *v.* Nilmoni, I. L. R., 9 Calc., 75. A public river is a highway. A nation possessing only the upper parts of a navigable river is entitled to descend to the sea without being embarrassed by useless and oppressive duties or regulations. (Kent's Commentaries, Lecture II, p. 37). The right of navigation is *simply* a right of way; it does not include a right to fish. (Orr Ewing *v.* Colquhoun, 2 App. Cas., 239, and Smith *v.* Andrews, 1891, 2 Ch., 696). As to the right of Government to the *soil* of all navigable rivers, see notes under "julkur," *supra*. The banks of even public rivers may be, and constantly are, private property, over which

Cannot be released or stopped.

Soil of highways, in whom vested.

Obstruction to high ways.

Rights of owner of soil.

Navigable river, a highway.

Banks of such rivers.

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to use the land as a public highway.[6] Eight and even six years have been held to be time enough wherein to presume the dedication from user.[7]

Corporation cases.

Where the inhabitants of a town, or sections of them, claim rights of recreation, &c., over land vested in the municipal corporation of the town as their trustees, the rights claimed are not servitudes or rights *in alieno solo*.[8]

Easements distinguished from other incorporeal rights.

Easements are imposed upon corporeal property for the benefit of other corporeal property.[9] But the easements themselves are 'incorporeal things.' *All* rights are intangible or incorporeal. But rights considered as themselves the *subjects* of ownership may be, and often are, treated as *things*. Certain rights have, as it were, become solidified into so compact and distinct a body that they are looked upon almost as tangible objects, and as capable of being owned by a person as any corporeal thing.[10] These 'incorporeal rights,' as they are also called, are either rights over *determinate* things, or rights *without* any *determinate* subject. All servitudes and easements are rights over determinate lands or over determinate things permanently attached to the earth. But a monopoly, a copy-right, and a patent-right, though 'incorporeal rights,' are not rights over determinate things. So the right of levying a toll at a certain bridge or ferry is an 'incorporeal right' without a determinate subject.[1] Rents are, also, incorporeal hereditaments, but they are not easements or

Monopolies, patent-rights, copy-rights, ferries, &c.

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there may be public rights of passage for the purposes of navigation. (Rooplall *v.* The Dacca Municipality, 22 W. R., 276). In Ball *v.* Herbert, 3 Term Rep., 253, it was held in England, against the doctrines of the civil law, that the public had no natural or common law-right to tow on the banks of navigable rivers. But Beng. Reg. XI of 1825, sec. 5, recognizes the public right of tracking or towing boats on the banks of navigable rivers. These towing-paths are of the nature of highways. As to trespasses on a highway, see [1892] 1 Q. B., 142.

Towing paths.

[6] J. Anderson *v.* Juggudamba, 6 C. L. R., 282. The Roman law required *immemorial* prescription in the case of public roads. (Encyclopædia Brittanica).

[7] Smith's Leading Cases, Vol. II, p. 152, 8th Ed.

[8] Goodman *v.* Mayor, 7 App. Cas., at p. 643. Such rights are also *not* appurtenant.

[9] Gale, 5th Ed., pp. 5, 8; 6th Ed., pp. 6, 7; sec. 4, Act V of 1882. The owner of a right to take certain minerals, which is an *incorporeal* right, may *perhaps* claim an easement for the beneficial enjoyment of such incorporeal property. (Gale, pp. 9, 10). Under Act V of 1882 the dominant heritage *must* be some *corporeal* property. (Stokes' Anglo-Indian Codes, Vol. I, p. 394).

[10] Amos' Science of Law, p. 168.

[1] Austin, Lecture XV and Table VIII. But the right of the owner of the ferry, so far as it involves a right to embark and disembark passengers on the landing-place in *another's* soil, is a right in the nature of an *easement*. The owner of the landing-place cannot, after

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servitudes. Rents "lie in render," that is, involve the *performance* of a positive act by the tenant, *viz.*, payment of rent. But no *servitude* consists *in faciendo*. (See p. 366).

'Incorporeal rights' are generally rights *in rem*.[2] But there may be rights *in personam* which *concur* with rights *in rem*. The rights answering to the obligations on the persons who happen to traverse the bridge are rights *in personam*. The rights corresponding to the obligation not to impede the levying of the toll or the passage over the bridge, or the obligation not to carry passengers across within the limits of the ferry are rights *in rem*.[3] Incorporeal rights *in rem*.

When it is said that an easement is an 'incorporeal right,' all that is meant is, that it is not a right to the *soil* of another's land, nor to any *corporeal interest* in such

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twenty years' user by the plaintiff, interfere with his profits by setting up a similar right of ferry from and to the same *ghât*. (Permeshuri *v.* Mahomed, I. L. R., 6 Calc., 608, 613). There is no indication in the Acts and Regulations here, that any person is entitled to claim a right to a *monopoly*, by prescription or by any means other than a grant from the Crown. (Per O'Kinealy and Amir Ali, JJ., Nityahari *v.* Dunne, I. L. R., 18 Calc., 652, at p. 661). But a grant from the Crown may, in many cases, be *presumed*, independently of the *express* law of prescription, upon an uninterrupted enjoyment of twenty years. (Goodtitle *v.* Baldwin, 11 East, 488; Banning, 152). Monopolies cannot be claimed by prescription.

[2] A right to an annuity charging the *person* of the grantor, but payable to the grantee and his heirs, is an instance of an incorporeal right or hereditament, being a right *in personam*. "Incorporeal hereditaments, which are of a purely personal nature, and do not savour of the realty are moveable property." Pensions and annuities not secured upon land, houses or the like, do *not* constitute an interest in *immoveable property*, which term, in Act XIV of 1859, includes such incorporeal hereditaments as savour of the realty. (The Collector *v.* Krishna Nath, I. L. R., 5 Bom., 322, at pp. 335, 336. Cf I. L. R., 20 Calc., p. 562). A profit *à prendre in gross*, though *personal* in one sense, is a right *in rem*. (See Gale, 5th Ed., 13, note; 6th Ed., p. 11, note. Incorporeal rights against a person.

In English law, Patent-rights and Copy-rights are called Incorporeal Chattels, while Easements and Profits are called Incorporeal Hereditaments. The right to establish a market or hold a haut on land, though an 'incorporeal right' and a franchise in England, is, when exercised upon one's own land, an ordinary right of property in India, subject, of course, to temporary control by the Magistrate under certain circumstances. See Kedarnath *v.* Rughonath, 6 N. W. P., 104; Gopimohun *v.* Taramoni, 4 C. L. R., 309; I. L. R., 5 Calc., 5, F. B. The Chetla *haut*, in the Suburbs of Calcutta, is not a market in the sense of a franchise. It is not the grant of a monopoly, though Government settled the land of the *haut* with a particular person. (Rakhal *v.* Durga, I. L. R., 17 Calc., 458). As to the right to set up a private ferry in a river, see note (1), *supra*, and note (7), *infra*. A franchise is a royal privilege or branch of the King's prerogative subsisting in the hands of a subject. (Blackstone). Incorporeal chattels. Markets and ferries.

[3] Austin, Lecture XV and Table VIII.

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land, though it creates an obligation or duty which attaches upon, or is annexed to, the land. The right to take minerals out of the soil of another is an incorporeal right,[4] but the right to a stratum of minerals is a corporeal right. The subject of the former right is a profit out of another's land; of the latter, a part of the soil itself. The holder of a right of easement cannot *exclude* the owner of the soil from *all* the benefit derivable from it.[5] It is a right severed from the larger right of ownership and possession.[6] It does not *wholly* deprive the servient owner of his right of using his property, nor does it deprive him of his right of disposition or alienation.

Certain incorporeal rights how acquired.

Incorporeal rights amounting to a profit *à prendre in gross*, or to an exclusive right to set up a private ferry in a river, though not easements within the meaning of Act V of 1882, bear a closer analogy to easements than to property, and it has been held that they may be acquired by grant *as well as* by *twenty* years' user or enjoyment.[7]

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[4] Gale, p. 9; Duke of Hamilton *v.* Graham, L. R. 2, H. Lds. Sc., 166. "A right to *all* the coal lying under a particular close is a corporeal right, because it is a right to a part of the soil." Goddard, 2nd Ed., p. 5; 3rd Ed., p. 6.

[5] Goddard, 2nd Ed., p. 5; 3rd Ed., p. 6. Buszard *v.* Capel, 8 B. & C., 141. The right to the exclusive use of land is larger than an easement, which is a mere privilege of using the land.

[6] Montriou, p. 64.

[7] A right *in gross* to fish in another's waters is an easement within the meaning of Act XV of 1877, and governed by the twenty years' rule. (I. L. R., 5 Calc., 945). It has been held by Garth, C. J., and White, J., that 20 years is the shortest period within which a right of ferry can be established by user. See note 1, p. 362, *supra*, and Permeshuri *v.* Mahomed, 7 C. L. R., 504; I. L. R., 6 Calc., 608. But the twenty years' rule has not been applied to public ways. And in a recent case, (Nityahari *v.* Dunne, I. L. R., 18 Calc., 652) O'Kinealy and Amir Ali, JJ., express a distinct opinion that a right of *exclusive* ferry, that is to say, a right to a *monopoly*, can *not* be acquired by twenty years' user under sec. 26 of Act XV of 1877. The learned Judges held that such a right may be conferred by a *grant* from the Government, and that when the proceeds of a ferry are entered as part of the assets, upon which the Permanent Settlement has been made, it cannot be disputed that the owner has got a ferry franchise. But, where the proceeds of a *market* in Bengal were entered as assets in the settlement of the land on which the market stood, it was held that such settlement was not a grant of the tolls *as* tolls, and did not imply a monopoly. (Rakhal *v.* Durga, I. L. R., 17 Calc., 458).

Markets and ferries.

Monopolies.

In Maharajah Luchmessur *v.* Sheikh Manowar, L. R., 19, Ind. App., 48, at p. 55, their Lordships of the Privy Council say it is recognised law in India, that a man may set up a ferry on his *own* property, and take toll from strangers for carrying them across; he may also acquire such a right by *grant* or by *user* over the property of *others*: and except as affecting the proof of his acquisition of title, it can make no difference whether he is a co-sharer with those others or not.

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But *all* incorporeal rights cannot be so acquired. If the roots or branches[s] of a tree growing on *A's* land encroach on *B's* land, *B* is not compelled to submit to such encroachment except where he has *granted* such an easement to *A*. A right of this kind, although it is of the nature of an easement, cannot be acquired by *prescription*, either because the user is secret (*i.e.*, not *open* as required by the law of prescription), or because the burden of the easement is liable to a *perpetual change*.

Trees encroaching on a neighbour's land.

We have seen that with regard to the *dominant* heritage, an easement is a new right or quality *superadded* to the ordinary (and natural) rights of property, and that with regard to the *servient* tenement, it is an obligation or burden which *curtails* such rights. When certain *absolute* duties are imposed on *all* tenements by the general principles of law (such as that expressed by the maxim *sic utere tuo ut alienum non lædas*),[t] or by any Municipal law, for the *general benefit of the community*, they are not easements. They are restrictions subject to which the ordinary and natural rights incidental to the ownership of property must be exercised by *all* owners of property in the State. In the case of *easements*, the restrictions are *specially* imposed for the benefit of *determinate* tenements

All restrictions are not servitudes or easements.

Where one of several sharers sets up a ferry on joint property, and no grant to him is proved, he can only set up *exclusive right* against his *co-sharers* by shewing either that he has dispossessed them for 12 years, or that he has held possession *adversely* to them for 12 years, or that he has enjoyed what he claims for 20 years as an easement and as of right. It should be stated here that the party who set up the ferry in this case did not claim a monopoly, *i.e.*, claim to be entitled to restrain competition. In the case before O'Kinealy and Amir Ali, JJ. (18 Calc., 652), the plaintiff sought to establish the right to a ferry franchise and to restrain the working of a "rival ferry." In Permeshuri's case (I. L. R., 6 Calc., 608), the plaintiffs sought to exclude the defendant from interfering with their profits by exercising a similar right of ferry over the same track. See note 1, p. 362, *supra*.

Right of ferry—may not be a monopoly.

[s] Gale, 5th Ed., p. 524; 6th Ed., p. 461. As to clippings falling on *A's* land from poisonous trees on *B's* land, see Crowhurst's Case, 4 Ex. Div., 5. If the boughs of *B's* tree grow over *A's* land, *A* may cut them off, but he cannot justify cutting them before they grow over his land, for fear they should grow over. (Norris *v.* Baker, 1 Rolle, Rep., 394; Gale, 5th Ed., p. 639; 6th Ed., p. 559). A person cannot by planting a tree on the land of another constitute himself the owner of it. But long enjoyment of the fruit of a tree may entitle a person to the continued enjoyment of the fruit, and to prevent the owner from cutting it down. Branson's Digest of Unreported Judgments of the Bombay High Court, p. 401.

Enjoyment of fruits.

[t] "Use your property so as not to injure the rights of another." An absolute duty does not correspond with a right residing in any particular or determinate party.

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or heritages by some *particular* act or incident. An obligation imposing a restriction on the use of a particular heritage, arising out of a *contract* as opposed to a *grant* or transfer, is also not an easement.

No easement consists *in faciendo.*

Easements being mere *restrictions* of the *rights* incidental to the ownership of property, impose on the owner or occupier of the servient tenement *negative duties* to suffer or forbear.[19] No right of easement can consist in *faciendo*,—*i.e.*, consist in a right to an *act* or *acts* to be performed by the *servient* owner or occupier. If it consisted in a right to an *act* to be done[1] by the owner or other occupant,

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[19] Strictly speaking, easements are imposed upon the property, and not the owner of it. Tudor's Leading Cases (Sury *v.* Pigot), p. 168; Statement of Objects and Reasons, *Gazette of India*, 13th November 1880, Part V, p. 477. A positive servitude consists *in patiendo*, and a negative servitude in *non faciendo*. (Moyle). See also p. 373, *infra*.

Liability to repair walls and embankments.

[1] Austin, Lecture, 49; sec. 27, Act V of 1882. Rents *lie in render* —they cannot therefore be easements. The servient owner cannot be required to cleanse a drain or to keep in repair a wall. If he is under any obligation to do so, it is not in consequence of any easement properly so called. In the Roman law, the *jus oneris ferendi* involved the duty of keeping the servient wall in repair. This was, at best, an exception to the rule that servitudes never consist in doing anything. Even in the case of this exceptional servitude, according to the better opinion, it was advisable to add an express condition necessitating repair. (See Ortolan's Roman law by Mears, p. 158). A local usage may impose such an obligation. Under the common law of this country, there is no liability cast upon a riparian proprietor to construct or keep in repair embankments for the protection of adjoining landholders, and the mere fact that he has always maintained an embankment is not sufficient to establish a prescriptive liability. See Nuffer *v.* Jotindro, I. L. R., 7 Calc., 505, 520. It has been held in England that by the common law, apart from prescription, the owner of land which immediately faces the sea is not liable to maintain or repair a sea-wall in front of his land. The cost of a sea-wall ought to fall rateably on the frontager as well as on all others who need its protection. (Hudson *v.* Tabor, L. R., 2 Q. B. Div., 290; Morland *v.* Cook, L. R., 6 Eq., 364). A liability *may* be imposed by prescription if there be frontager has always maintained a sea-wall for his own benefit is not sufficient to establish a prescriptive liability to maintain it for the benefit of others—though such others had in fact benefited by the acts of the frontager. (Hudson *v.* Tabor, L. R., 2 Q. B. Div., 290, 292). Corporations are often subjected to such a liability by prescription. It may be observed that a natural person cannot be bound by the act of his ancestor without a lien and assets. Williams on Rights of Common, 363. Repeated acts of repairing another's building, tank, &c., cannot give an exclusive right to repair. (See Muttaya *v.* Sivaraman, I. L. R., 6 Mad., 229, 236).

Spurious easement.

A right which imposes on the servient owner a positive duty to do something is a spurious easement. See Gale, 5th Ed., p. 516; 6th Ed., p. 455; see also sec. 4, Illus. (*f*), and sec. 24, Illus. (*f*). The dominant owner may, of course be entitled to a positive right to do something.

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it would be merely a right *in personam* against that determinate party, and not a right *in rem*. An easement being a right *in rem*, remains unchanged, although the servient heritage is possessed by a person other than the owner and adversely to such owner.[2] So long as the easement continues to exist, it avails against strangers as well as against the successive owners of the servient tenement. Trespassers on the servient heritage.

It follows from the nature of easements as definite accessorial rights *subtracted* from the indefinite rights of user and exclusion which reside in the owner of the servient heritage, that no person can have an easement in a tenement of which he *himself* is the owner. *Nulli res sua servit.*[3] The servient heritage must be distinct from the dominant heritage, and the two heritages must not belong to the same individual. If the two heritages are owned by the same person "he has a right as owner to use each in whatsoever manner he finds most convenient to himself, and he may make the one tenement servient to the other, simply because it is his own; in whatever manner, therefore, he exercises his right, he exercises it in his capacity of owner of the soil, and the right he exercises is not an easement, but a proprietary right incident to the ownership of the land."[4] As Lord Hatherley, Chancellor, said: "You cannot have the land itself and also an easement over it."[5] It is on this principle that an easement is *extinguished* when the same person becomes entitled to the *Nulli res sua servit.* Ownership inconsistent with easement.

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[2] Austin, Lecture, 49. Even "in the case of a negative servitude, it is possible (though not very likely) for a stranger, *e.g.*, a trespasser, to do the act which would prevent the enjoyment of the servitude, *e.g.*, to build up, or otherwise obstruct ancient lights." Student's Austin, p. 395.

[3] Austin, Lecture, 50; Poste, Gaius, p. 181.

[4] Goddard, 2nd Ed., p. 10; 3rd Ed., p. 14.

[5] Ladyman *v.* Grave, L. R., 6 Ch. Ap., 763, 767. It is on this principle that a tenant cannot acquire an easement by prescription in land belonging to his landlord. Goddard, 2nd Ed., p. 11; 3rd Ed., p. 15. The occupation of close *A* by a tenant is occupation by his landlord. The tenant cannot by such occupation acquire an easement over close *B*, also belonging to his landlord. (Outram *v.* Maude, L. R., 17 Ch. D., 391). Otherwise, if close *B* be in the occupation of another tenant of the same landlord. (Stokes' Anglo-Indian Codes, Vol. I, p. 907; Mitchell *v.* Cantrill, L. R., 37 Ch. Div., 56; Gale, 6th Ed., p. 202, note. See note (7), *infra*). In a suit brought to establish a right of ownership over certain land, it is not competent to the Court to enter into and decide upon the plaintiff's right to an easement over the same. (Lalji *v.* Gangaram, 2 Bom., 178; Goduri Sambya *v.* Gopalakrishnamma, 2 Mad. L. Journal, 257). The Courts are not at liberty either to grant a relief not prayed for in the plaint, or that does not naturally flow from the ground of claim as stated in the plaint. (Virasvami *v.* Ayyasvami, 1 Mad., 477). But though a plaintiff must be limited to the case which he Tenant against landlord. Inconsistent claims.

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absolute ownership of the whole of the dominant and servient heritages.[6] And where the *owner* of a particular tenement holds another tenement as a *lessee* under another person, he cannot acquire for the benefit of the former an easement over the latter.[7] When the owner of either the dominant or the servient tenement becomes entitled to

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Alternative claims.

puts forward in his plaint, he may put forward an alternative case in his plaint from the commencement, as the defendant then will know that he has more than one case to meet, and will not be taken by surprise. (Lakshmibai *v.* Haribin, 9 Bom., 1. F. B.) It has been held in Calcutta that if a plaintiff comes into Court with a case which is double and inconsistent, as, for example, that he is proprietor of land over which he claims an easement, one of the two inconsistent rights must be relinquished or declared unproved before the other can be established. (Dhunput *v.* Narain, 20 W. R., 94, explaining Rajah Bejoy *v.* Obhoy Churn, 16 W. R., 198). In Toolseemony *v.* Jogesh (1 C. L. R., 425), the Calcutta High Court allowed the plaintiff to sue for a mandatory injunction, on the ground that she was the owner of the soil of a private lane, and, in the alternative, on the ground that she had a right of way over the lane. It has been laid down by Lord Cairns that alternative relief may be asked for if in both alternatives the question arises mainly upon the same facts, and the Judicature Act has enlarged the liberty of the plaintiff in claiming relief. (See Bagot *v.* Eston, 7 Ch. D., 1). The plaintiff, however, should not be allowed to make inconsistent statements of *facts*. (See Mahomed *v.* Hosseinie, I. L. R., 15 Calc., 684). It has been held by Sargent, C. J., and Birdwood, J., that a plaintiff who, in a suit for possession, fails to establish his title as owner of a piece of land, cannot, in a subsequent suit, seek to enforce a right of easement over the same land, either under sec. 26 of Act XV of 1877, or under the general law as to immemorial user. The plaintiff having in that suit claimed the right to use the land by right of ownership of the land itself, can not now allege that he had been claiming or enjoying the right as an easement. (See Chunilal *v.* Mangaldas, I. L. R., 16 Bom., 592). Cf. Toolseemony *v.* Jogesh, 1 C. L. R., 425. Cf. De La Warr *v.* Miles, 17 Ch. Div., 535.

[6] Sec. 46, Act V of 1882. A necessary easement, *i.e.*, an easement of necessity, is suspended, rather than extinguished, by 'unity of ownership.'

Easements acquired by tenants.

[7] Kristna *v.* Vencatachella, 7 Mad., 60, 64 ; sec. 12, Act V of 1882. But a tenant may acquire as against another tenant of the same landlord an easement which will continue so long as both the leases continue ; see Goddard, 2nd Ed., pp. 11 to 13 ; 3rd Ed., pp. 15 to 17. Sec. 8, Illus. (*d*), and sec. 37, Illus. (*e*), Act V of 1882, show that such defeasible easements may be imposed or granted. But a right to be acquired by immemorial prescription, or under the English Prescription Act, must be acquired permanently so as to be valid against the owner of the fee. (Bright *v.* Walker, 1 C. M. and R., 217 ; Wheaton *v.* Maple, 1993, 3 Ch., 48, at pp. 65, 68). A right to light so acquired by one tenant against another tenant of the same landlord is acquired, not only for the tenant, but for the future freeholder of the dominant tenement if a severance should occur before the leases expired. (Frewen *v.* Phillips, 11 C. B. N. S., 449 ; Goddard, 4th Ed., 17). A tenant of *A* may acquire on behalf of *A* an easement against another landlord. (See sec. 12, Act V of 1882). In England at Common Law, a tenant can prescribe, only in right of his landlord,

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possession for a *limited* interest in the other tenement, the easement is *suspended*, but it revives if the 'unity of possession' ceases to exist before the right is extinguished by long non-enjoyment.[8]

Servient owner cannot require easement to be continued.

An easement being a right or privilege acquired for the convenient or beneficial enjoyment of the *dominant* heritage *alone*, its exercise may be discontinued by the dominant owner. The *servient* owner has no right to require that an easement be continued.[9] No *reciprocal* or *counter*-easement can be acquired for the benefit of the servient tenement, by the user or exercise of the easement by the dominant owner.[10] The servient owner cannot, of his own

No reciprocal easement acquired by servient owner.

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the owner of the fee. (Goddard, 3rd Ed., p. 15). An easement other than that of light, cannot be acquired even by forty years' user, against a lessee of *A* if the claim is resisted by *A* within three years of the determination of the lease. (Sec. 8, Eng. Pres. Act). Cf. sec. 27, Act XV of 1877, and see note 3, p. 372, *infra*.

[8] See secs. 49 and 51 of Act V of 1882. "Where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way." (James *v.* Plant, 4 A. and E., p. 761; Goddard, 3rd Ed., p. 14).

[9] Khoorshed *v.* Teknarain, 2 C. L. R., 141. Sec. 50, Act V of 1882, gives the servient owner a right to *sue* for *damages* in case he has not received such a notice of the extinction or suspension of the easement as would enable him, without unreasonable expense, to protect the servient heritage from the possible effects of the extinction or suspension.

[10] Goddard, 2nd Ed., p. 15; 3rd Ed., p. 20. There *may* be *cross*-easements of support in the case of a party-wall, one determinate moiety of which belongs to *A*, and the other moiety to *B*. See Gale, 5th Ed., p. 513, note; and Watson *v.* Gray, 14 Ch. Div., 192. See p. 348, note, *supra*. In the case of a cross-easement of this sort, *both A* and *B* are dominant *as well as* servient owners. In the case of a claim to a reciprocal or counter easement (referred to in the text), *one* only of the two persons is the dominant, and the other the servient owner. In a *third* class of cases a benefit derived from a neighbour's building or trees, though enjoyed for more than twenty years, does not amount to a *prescriptive* right of easement in favor of *any* person, specially, if it is of a *novel* kind and not recognised by the law. The mere repair of a man's own fence for his own benefit, however often done, and during however long a period of time, will not *per se*, although a man's neighbour may in fact benefit by such repair, impose on a man the duty of continuing such repair for his neighbour's benefit, when he ceases to care to do it for his own. (Hudson *v.* Tabor, L. R., 2 Q. B. Div., 292. Per Lord Coleridge, C. J., at p. 292. See also p. 366, *supra*).

Cross-easements.

Right to shade, shelter or other benefit from trees, walls or fences.

By merely building a room on his own land so close to his neighbour's wall, that though the structure does not touch, nor is in any way supported by the wall, the wall shelters the structure on one side, and practically serves as a side-wall to the room, a man cannot, by however long user of such benefit derived from the neighbour's wall, acquire an easement over the wall. (Gordhan *v.* Chotalal, I. L. R., 13 Bom., 79). The owner of the wall does *not submit* to the enjoyment of the shelter,

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Servient owner has no right to the flow of water or manure.

motion, invert his relative position and become the dominant owner. The flow of water for twenty years from the eaves of a house cannot give the owner of adjacent lands a right to insist that the house shall not be pulled down or altered, so as to diminish the quantity of water flowing from the roof.[1] The flow of liquid manure from a drain on *A's* land for twenty years cannot give his neighbour a right to preclude *A* from altering the level of his drain and applying the manure to his own purposes.[2] An easement imposes a *burden* on the servient tenement for the *sole benefit* of the dominant tenement; and the right of the dominant owner to get rid of what at the time is a nuisance to his property, does not give the servient owner a right to compel the *continuance* of the flow for his own benefit. The use or enjoyment of the water or manure by the servient owner is not *of right*, but only so long as the particular purpose for which the easement exists is served.[3]

Artificial watercourses.

There is *no submission* (*patientia*) by the dominant owner to the enjoyment of the water or manure by the servient owner. In the case of an *artificial* watercourse originating in the mode of occuption or alteration of a person's property, the state of circumstances very often shows that the watercourse is not of a *permanent* nature but liable to variation, and that the originator of the watercourse never intended to give, nor the servient owner to enjoy, the use of the water, &c, as a matter of *right*.[4]

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as a matter of *right*, and the claim to such a right to shelter, is a claim to a new species of easement not recognised by the law. The same remarks apply to the enjoyment of the shade from trees planted on another's land. (See an unreported judgment of Petheram, C. J., and Tottenham, J., in a criminal appeal *in re* Gokul Panday, dated the 10th May 1888). In these cases, there being no easement, neither of the two neighbours is a dominant or a servient owner.

[1] Wood *v.* Waud, 3 Exch., 78. The same principle applies to water (naturally) falling on one's land, when it does not pass in a *defined* channel. If such water is allowed to flow into a neighbour's land, such neighbour cannot acquire a prescriptive right to the use of the water so as to be able to prevent the other from stopping the flow. See Bunsee *v.* Kalle, 13 W. R., 414. The servient owner cannot prevent the dominant owner from putting an end to the servitude at any time he may think proper. Khoorshed *v.* Teknarain, 2 C. L. R., 141.

[2] Greatrex *v.* Hayward, 8 Exch., 291.

[3] See Mason *v.* Shrewsbury, L. R., 6 Q. B., 578; Gale, 5th Ed., pp. 313, 316; 6th Ed., pp. 279, 282; Goddard, 2nd Ed., p. 15; 3rd Ed., p. 20.

[4] Wood *v.* Waud; Gale, p. 311. A claim of a right to such water or manure by the servient owner is "a very difficult kind of right to establish." Per Bowen, L. J., in Chamber Colliery Co. *v.* Hopwood, 32 Ch. D., 549. See Ramessur *v.* Koonj, I. L. R., 4 Calc., 633, P. C., as to prescriptive easements in respect of artificial reservoirs and channels. See also Rayappan *v.* Virabhardra, I. L. R., 7 Mad., 530.

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How far the *causes* of easements must be permanent.

By the civil law, the causes of easements must be perpetual, so that the qualities impressed upon the dominant and servient tenements might be in their nature *permanent* and capable of continuing in their present condition for an indefinite period.[5] This rule, so far as it extends to the *servient* tenement, has been, not expressly, but in fact adopted in the English Courts and by Her Majesty's Privy Council.[5a] (Gale, 6th Ed., p. 17). There is one English case (*Maberley* v. *Dowson*) decided in 1827, in which a like rule seems to have been applied to the *dominant* tenement.[6] (*Ibid.*, p. 18). It has been held that a *prescriptive* easement of light cannot be acquired in respect of a window of a workshop built upon posts in such a way as not to be *permanently* attached to the earth.[6] It has also been held in several cases that a right cannot be acquired to the flow of water against the originator of an artificial stream created manifestly for a temporary purpose.[7] In Goddard on Easements,[8] it is laid down that no prescriptive easement can be acquired unless the dominant and servient tenements, as well as the subject of the easement (*i.e.*, the advantage or convenience claimed) are permanent in their character. Act V of 1882 enacts that the dominant as well as the servient tenement must be land or things permanently attached to the earth.[9] This provision applies to all easements, whether prescriptive or not. But it is not necessary either under the English law or under Act V of 1882, that an easement should be permanent. An easement for a limited time, or an easement on condition (precedent or subsequent) may be imposed by *grant*.[10] In *Kristna* v. *Venkata*, at page 64 of the Madras High Court Reports, Vol. VII, Innes, J., says: "An easement implies an absolute outright grant to some person of an incorporeal right as appurtenant to his corporeal property. Such a grant cannot be conceived as made to a mere tenant in respect of a tenement in which

Easements—not necessarily permanent.

The *mere* fact of riparian proprietorship gives no rights whatever over an artificial stream. Bhoop Naraian *v.* Kazee Syud, 6 W. R., 99. It is otherwise with a natural watercourse. Sheikh Monoor *v.* Kanhaya, 3 W. R., 218.

[5] Gale, p. 18 ; 6th Ed., p. 16.

[5a] Ramessur *v.* Koonj, I. L. R., 4 Calc., 633, P. C.

[6] Moberley *v.* Dowson, 5 L. J., K. B., 261 ; Goddard, p. 147 ; Innes' Digest, 2.

[7] Gale, p. 311 ; Goddard, p. 148 ; I. L. R., 4 Calc., 633, P. C.

[8] 2nd Ed., p. 147 ; 3rd Ed., p. 224.

[9] Sec. 4, Act V of 1882.

[10] Sec. 6, Act V of 1882 ; Goddard, 4th Ed., p. 128. Imposed by grant, not by prescription.

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his interest is precarious."[1] But an easement is not necessarily an absolute outright grant. Lessees under the same lessor may acquire against each other by a grant (proved, or inferred as a *fact* from evidence of enjoyment and other circumstances), a right of way or other easement co-extensive with the period of years during which the two leases jointly continue in force.[2] The rights of one tenant against another in a case like this, may be called "base" easements, as opposed to "fee simple" easements.[3]

Lessees under the same lessor may acquire rights against each other. "Base easements."

Easements are so far indivisible that they cannot be acquired, exercised or lost in respect of an ideal part of a heritage. One of two co-owners cannot, without the consent of the other, impose an easement on the joint property or any part thereof, but he may acquire an easement for the beneficial enjoyment of the whole of such property. When the dominant heritage is divided or partitioned, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage. When the dominant owner exercises, for twenty years, a right less extensive than that to which

Indivisibility of easements.

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[1] The interest of the tenant in this case was defeasible for non-payment of the assessment imposed upon it.

[2] Goddard, 4th Ed., pp. 15-18; Stokes' Anglo-Indian Codes, Vol. I, p. 907; sec. 8, Illus. (*d*), Act V of 1882. And a lessee whose interest is permanent and transferable may, of course, impose an easement upon the demised land in favor of another like lessee of the same landlord; but such easement is liable to be extinguished by a sale for arrears of rent of the servient tenure or holding. Sec. 37, Illus. (*d*). See note (7), p. 368, *supra*. See also [1893] 3 Ch., 48, 65.

[3] 33 Ch. D., 238; Daniel *v.* Anderson, 31 L. J., Ch., 610. "Whatever may be the rights of one tenant against another, the owner remains where he was." Goddard, 3rd Ed., p. 16. An easement cannot be acquired by prescription, unless the user has been such as to give a good title against all persons, including the owner of the fee in the servient tenement." (*Ibid.*, p. 126). Rights granted by one tenant in favor of another tenant of the same landlord not being absolute rights are hardly easements in the usual acceptation of the term. In Frewell *v.* Phillips, 30 L. J. C. P., 356, it has been held that under sec. 3 of the English Act an indefeasible easement of light may be acquired by twenty years' user by one lessee against another lessee of the same landlord. And in Harris *v.* De Pinna, 33 Ch. D., 238, Chitty, J., was of opinion that forty years' enjoyment of any other easement by one tenant against another tenant of the same lessor would give an absolute right against all the world except the reversioner who might resist the right within three years of the determination of the lease. But it has been held by the Court of Appeal (Wheaton *v.* Maple, 1893, 3 Ch., 48) that an easement, if acquired by prescription, either at common law, or under any section of the English Act, must be *absolute*, and not for a term of years; that 20 years' user of light under sec. 3, against a tenant confers a right against him *as well as* his lessor (p. 65); and that *no right* is acquired by 40 years' user of other easements under sec. 2, (even against the tenant) until the three years allowed to the lessor have expired. (*Ibid.*, pp. 66, 68).

20 years' user of light, and 40 years' user of other easements, by tenants in England.

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he is entitled, his easement is not reduced to the right actually exercised.'[4]

Easements positive or negative.

It is usual to speak of easements as either affirmative or negative. An affirmative or positive easement authorizes the dominant owner (that is, the owner or occupier of the dominant heritage) to do something in, upon, or in respect of the servient heritage. The acts, the commission of which is authorized, would ordinarily, if the easement did not exist, give the servient owner (that is, the owner or occupier of the servient heritage) a cause of action, or a right to sue for trespass or nuisance.[5] A right of way, or a right to pollute air or water, is an affirmative easement. All rights of common, which are profits *à prendre*, are cases of positive or affirmative servitudes.

Profits—positive.

A negative or privative easement entitles the dominant owner (not to do anything, but) to prevent something being done in, upon, or in respect of the servient heritage. The exercise or enjoyment of the easement is of such a character that it would not, even if the easement did not exist, give the servient owner any cause of action An easement annexed to *A's* house to receive light and air by its windows, without obstruction by his neighbour *B*, is, in this sense, a negative easement. This prevents *B* from exercising his right to build on his own land to the obstruction of the easement.

There is no *purely* positive or negative easement.

It is only as regards the dominant owner that this division of easements into affirmative and negative is possible. For, as regards the servient owner, the obligation or duty is always negative. The servient owner is never bound to do anything; his duty is to forbear from using the subject in a given manner or mode. And it should be observed that, even as regards the dominant owner, no affirma-

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[4] *Gazette of India*, 13th November 1880, Part V, pp. 478, 479; secs. 8, 12, and 30 of Act V of 1882. Prædial servitudes are indivisible, *i.e.*, they cannot be acquired, exercised, vindicated or lost in part only. (Ortolan's Roman Law by Mears, p. 156).

[5] For the distinction between positive and negative easements, see Gale, p. 22; 6th Ed., p. 18. Negative easements can under no circumstances be interrupted except by acts done upon the servient heritage. The exercise of affirmative easements (before the rights are acquired) may be the subject of legal proceeding as well as of physical interruption. (Sturges *v.* Bridgman, 11 Ch. Div., 852). As regards the servient owner, an affirmative easement consists in *patiendo*, and a negative easement in *non faciendo*. As regards the dominant owner, affirmative easements in respect of parcels of land are *jus faciendi*, and those in respect of buildings are *jus habendi*, while negative easements in respect of buildings are *jus prohibendi*. (Poste, Gaius, 166). *Jus faciendi* and *jus habendi* are included in the general term *jus utendi*.

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No purely positive or negative easement.

tive easement is purely positive, for such an easement gives him a right to do certain acts over the given subject, as well as a right to prevent the servient owner and others from molesting him in the performance of those acts. And although the idea of a negative easement is, that it gives the dominant owner merely a right to forbearances, that is, merely a right to prevent something being done upon the servient heritage, yet such an easement is not purely negative, for even in such a case, the dominant owner may be said to put the servient heritage to certain uses.[6] The easement of support for buildings from the subjacent or adjacent soil of the servient heritage, is generally spoken of as a negative easement, but it is inaccurate to describe it as one of a merely negative kind. The dominant tenement positively imposes upon the servient a constant burden, the sustenance of which, by the servient tenement (vertically or laterally) is necessary for the safety and stability of the dominant.[7] The right to light is more purely negative. The same remark applies to the customary easement to restrain interference with privacy.[8] It is more purely negative than a right to support. A right to the uninterrupted flow of a stream in a permanent artificial channel, against the originator of such channel, is another instance of a negative easement. In these three cases nothing positive is done in or upon the land of another man, but the dominant owner does nevertheless put the servient heritage to certain uses. A right to discharge water by a spout or projecting eaves, on a neighbour's land, is an affirmative easement so far as something positive is done in or upon the servient heritage, and a negative easement, so far as the servient owner is bound to refrain from exercising his right to build on his land so as to prevent the discharge. Similarly, *A's* right of way over *B's* land restrains *B* from treating *A* as a trespasser, and from building on his land to the obstruction of the easement.

Austin, in his lectures, doubts if there is any scientific foundation for the distinction of easements into positive

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[6] See Austin, Lecture, 49. Students' Austin, pp. 392 and 393.

[7] See Lord Selborne's judgment in Dalton *v.* Angus, 6 App. Cas., 740, at pp. 793 and 797. The adverse (inchoate) enjoyment of support gives, at least theoretically, a cause of action. See pp. 764 and 784, *ibid.*

[8] Illus. (*b*), sec. 18, Act V of 1882. For cases not governed by the Easements Act, see Mahomed *v.* Birjoo, 14 W. R., 103; Kalee Pershad *v.* Ram Pershad, 18 W. R., 14; Kamathi *v.* Garunada, 3 Mad., 141; Manishankar *v.* Trikam, 5 Bom., 42; Shrinivash *v.* Reid, 9 Bom., 266; and Gokal Prosad *v.* Radho, I. L. R., 10 All., 358, where all the cases on the subject are fully discussed.

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and negative, and Lord Selborne, in *Dalton* v. *Angus*, (6 App. Cas., 740), seems to be of the same opinion.

Easements continuous and discontinuous.

Easements are either continuous or discontinuous. A continuous easement is one whose exercise or enjoyment is continual, or may be continual without the act or actual interference of man, as a right to light and air, a water-spout, &c.[9] A discontinuous easement is one that needs the act of man for its exercise. It can be enjoyed only by a fresh act on each occasion of its exercise, as a right of way, or a right to draw water.[10] Discontinuous easements are more purely positive, and some continuous easements more purely negative, in their character.

Apparent and non-apparent.

Easements are also either apparent or non-apparent. An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him. Its existence is shown by some external work, such as a window, a spout, a gutter or other watercourse.[1] A non-apparent easement is one that has no such sign, as a right to prevent the servient owner from building on particular land, or from building above a certain height.[2] The Roman law further divides easements or real servitudes into urban and rustic—a division which has no scientific precision.[3] An urban servitude is appurtenant to a building, and therefore occurs most frequently, though not necessarily, in a city or town, as a right to the access of light to windows. A rustic or rural servitude is appurtenant to a parcel of land, and therefore occurs most frequently in the country, as, an easement annexed to *A's* field to thresh grain on *B's* field. But there may be rustic servitudes in towns and cities, as there may be urban servitudes in the country. All the recognized rustic servitudes are affirmative and discontinuous, while urban servitudes are continuous, and either affirmative or negative. (Poste, Gaius, 166; Mears' Ortolan, 157, 159).

Urban, and, rustic or rural.

Inconsistent and subordinate easements.

Two wholly inconsistent easements cannot co-exist in respect of the same servient heritage or tenement, but one subordinate easement of a character inconsistent with another superior easement may co-exist, if the former does not lessen the utility of the latter.[4] Thus, if *A* has appurtenant to his house a right of way over *B's* land, *B* may

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[9] Gale, p. 25; 6th Ed., p. 21; sec. 5, Act V of 1882.

[10] *Ibid.* See also Innes' Digest, 4.

[1] *Ibid.* Sewers and drains are also good instances.

[2] *Ibid.*

[3] Austin, Lecture, 50.

[4] Goddard, pp. 24 and 25; 3rd Ed., p. 33.

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grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way, provided that *A's* right of way is not thereby obstructed.[5] Here *C's* easement is subordinate to *A's* right of way. Under Act V of 1882,[6] the servient owner cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen the utility of the existing easement, and although there is no express prohibition against the acquisition by prescription of two absolutely inconsistent easements, over the same servient heritage, by two different persons, such acquisition is not possible, by reason of the enjoyment of either easement being an obstruction to the actual enjoyment of the other.

Accessory or secondary easements.

The right of the dominant owner as against the servient owner to do all acts necessary to secure the full enjoyment of the easement is, as if it were, appurtenant to the easement. Mr. Gale calls this right a secondary easement as distinguished from the primary easement.[7] Act V of 1882 more accurately calls rights of this nature accessory rights.[8]

Every system of law recognises servitudes.

'Natural Rights' originated from the disposition of nature and the wants of society; and in the course of time 'easements' were stipulated for by private persons as matter of utility, or even pleasure.[9]

In *Bagram* v. *Khetter Nath Karformah* (3 B. L. R., O. C., 18, 37), Mr Justice Norman says: "The laws of every country must necessarily recognize servitudes. It has been well said (by Pardessus) that the origin of servitudes is as ancient as that of property, of which they are a modification. It seems clear that servitudes were known and recognized both by Hindu and Mahomedan law."

Mahomedan law.

It appears from the Hedaya that a right in the nature of an easement is acquired by one who digs a well in waste ground, *viz.*, that no one shall dig within a certain distance of it so as to disturb the supply of water. Rights to the use of water for purposes of irrigation or drainage are also recognized and defined. And one urban servitude, at least, is mentioned, *viz.*, the right to discharge water on the terrace of another.[10]

Hindu law.

In Halhed's Gentoo (Hindu) Law,

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[5] Illus. (*b*), sec. 9, Act V of 1882.

[6] See sec. 8.

[7] Gale, p. 549; 6th Ed., p. 480.

[8] Sec. 24.

[9] Pardessus, cited in Gale on Easements, 5th Ed., p. 3.

[10] See 3 B. L. R., O. C., 37; Hamilton's Hedaya, Vol. IV, pp. 132 to 155. The Hon'ble Sayyad Ahmad Khan, in his speech in the Legislative

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which is a translation of a compilation of the ordinances of the Pandits, made under the direction of Warren Hastings, between 1773 and 1775, it is laid down, that "if a man hath a window in his own premises, another person having built a house very near to this and living there with his family hath no power to shut up that man's window; and if this second person would make a window to his own house on the side of it, that is, towards the other man's house, and that man at the time of constructing such window forbids and impedes him, he shall not have power to make a window. If the drain of a man's house hath for a long series of years passed through the buildings belonging to another person, that person shall not give impediment thereto."[1] Many other species of servitudes, such as those relating to the use of pools or wells, eavesdroppings, and pathways, are referred to in the same book.[2] In treating of 'contest regarding boundaries,' the *Vivad Chintamoni* mentions easements concerning windows, watercourses, verandahs, cornices, thoroughfares, &c.[3] Hindu law.

The following among other rural servitudes were recognized by the civil law[4]:—

Servitudes recognized by the civil law.

1. *Via*, the right to use a paved way for heavy laden waggons or for any other purpose. *Via* included *actus* and *iter*.

2. *Actus*, the right of passage for beasts or ordinary vehicles. This included *iter*.

3. *Iter*, the right to pass along on foot or on horseback.

4. *Aquæ ductus*, the right of conducting water (*aquæ ducendæ*) through the land of another.

The following among other urban servitudes were recognized by the civil law:—

5. *Onera vicini sustineat* and *paries oneri ferendo*, by which the servient tenement was obliged to support the

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Council (16th February 1882), said: "The subject of easements is no novelty to the Mussalman mind. Easements are familiar to them, and their law-books are full of rules, in regard to what are termed by Mahomedan lawyers as neighbours' rights." See Gale's definition of "easements" and also that given by Mr. Justice Innes, at p. 345, *supra*.

[1] See 3 B. L. R., O. C., 37; Halhed's Gentoo Code, 185.

[2] See Halhed's Gentoo Code, Chapter on Boundaries and Limits, pp. 181—186.

[3] See Prossunno Coomar Tagore's Translation of the *Vivad Chintamoni*, pp. 124—127.

[4] See Sandars' Justinian, Book 2, Title 3; Gale on Easements, 5th Ed., pp. 269, 274, 328, 329, 392, 393, 534, 538, and 572.

Affirmative easements—*jus utendi* { *jus faciendi*, *e.g.*, 1, 2, 3, 4. *jus habendi*, *e.g.*, 5, 6, 7, 8.

Negative easements—*jus prohibendi*, *e.g.*, 9, 10, 11. (See text, p. 378).

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Civil law.

weight of the dominant edifice. It was the right of resting a weight on a neighbour's wall or pillar. As to the exceptional nature of the *jus oneris ferendi*, see p. 366 (note), *supra*.

6. *Tigni immittendi*, the right of inserting a beam of one house into the wall of a neighbouring house.

7. *Jus projiciendi* and *jus protegendi*, by which a wall or roof, a balcony or eaves, projecting over the boundary line of the servient heritage could not be removed by the servient owner.

8. *Stillicidii vel fluminis recipiendi*, the servitude of receiving the rain-water of the dominant heritage in drops from the eaves or in a current by a spout or gutter, that is, of receiving the *stillicidium* or *flumen* of the dominant owner.

9. *Altius non tollendi*, by which the servient heritage was prohibited from being raised above the dominant heritage.

10. *Jus luminum* and *ne luminibus officiatur*. The former prevented a neighbour blocking up our windows or lights, the latter prevented his doing anything whereby the light was in any way, however slightly, intercepted from our house.

11. *Ne prospectui officiatur*, or the servitude of not hindering or obstructing the prospect of the dominant house.

An easement to restrain interference with privacy is recognized generally in the countries whose system is founded on the civil law.[5]

Easements recognized by the English law.

The following are some instances of easements recognized by the English law[6]:—

Rights of way. Right to make surface uneven by working mines in such manner as to let it down. Right to go on soil of another to clear a mill-stream and repair its banks.

Rights to draw water, to water and pasture a flock, to burn lime, to extract sand or chalk, and to cut timber, were some of the other rural servitudes. (See Poste, Gaius, 166; Mears' Ortolan, 157).

The English law of easements and profits is derived mainly from the Roman system. (Digby, 148). On this branch of English law, the opinions of the civilians seem to be now almost adopted as authority. (Gale, Preface to the Second Edition; Benest *v.* Pipon, 1 Knapp, 69; Acton *v.* Blundell, 12 M. and W., 324).

[5] See the Report of the Law Commission, published in the Supplement to the *Gazette of India*, 17th January 1880; Domat's Civil Law, Vol. I, Arts. 1043 & 1044; Gokal Prosad *v.* Radho, I. L. R., 10 All., 358, at pp. 378 and 388. As to the Indian law on the subject of privacy, see Gokal Pershad *v.* Radho, I. L. R., 10 All., 358; Kamathi *v.* Gurunada, 3 Mad., 141; Manishankar *v.* Trikam, 5 Bom., 42; Mahomed Abdur *v.* Birju Sahu, 5 B. L. R., 676; (S. C.) 14 W. R., 103; sec. 18, Act V of 1882. See p. 385, *infra*.

[6] See Gale on Easements, 5th Ed., pp. 23, 24. Mr. Goddard mentions three other instances: a right to nail trees to a wall; a right to

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Right to go on a neighbour's close and draw water from a spring there, or to water his cattle at a pond, and to take the water thereof for domestic purposes. The right to conduct water across a neighbour's land by an artificial watercourse,[7] and to go upon that land for purpose of turning the water into the same. Right to discharge water or other matter on to a neighbour's land. Right to discharge rainwater by a spout or projecting eaves.[8] Right to use or to affect water of natural stream in any manner not justified by natural right. Right to support from a neighbouring wall. A right to drive a pile into the bed of a river for the more convenient use and enjoyment of a wharf. A right to a fender in a mill-stream to prevent a waste of water. A right to have a name-plate on a door. A right to have a fascia or notice-board or sign fastened on another's house.[9] A right to have a sign-post on a common before a public house. Rights to carry on offensive trades, and other easements by which private nuisances are legalized. Right to hang clothes on lines passing over the neighbouring soil and to carry telegraph wires over houses. (3 B. & Ad., 735). Right to make spoil-banks upon surface in course of working minerals. Right to use close for purpose of mixing muck and preparing manure there for an adjoining farm. Right to bury in a particular vault. Right to pew in a church.[10] Right to support of buildings by adja- English law.

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use another's chimney for conveyance of smoke ; and a right to tether horses. See p. 74; 3rd Ed., p. 105.

[7] The right to artificial watercourses, as against the party creating them, depends upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created. Gale, p. 311 ; see also Ramessur *v.* Koonj Behari, I. L. R., 4 Calc., 633, 638, P. C. ; Raya *v.* Vira, I. L, R., 7 Mad., 530 ; Rajrup Koer *v.* Abul Hossein, I. L. R., 6 Calc., 394, P. C. As to the difference between the enjoyment of a natural and that of an artificial watercourse, see Perumal *v.* Ramsami, I. L. R., 11 Mad., 16, 21; Bhoop Narain *v.* Kazee Syud, 6 W. R., 99. See p. 371, *supra*.

[8] Harvey *v.* Waters, L. R., 8 Ch. Ap., 162.

[9] Francis *v.* Hayward, 22 Ch. D., 177.

[10] It may, however, be doubted if the church or the pew in it, independent of the right of sitting in the pew, is strictly speaking, a *servient tenement*. Some authorities treat this right as only a *quasi*-easement. See Brown, 368, 369. In Phillips *v.* Halliday, Lord Herschell speaks of the "so-called" prescriptive rights to pews as interests *akin* to rights of property (1891, A. C., 228, at p. 233). A right to a pew, or to a several fishery *in gross* is governed by the common law, not by the English Statute of Prescription. (Encyclopædia Brittanica). Even where a pew was annexed or appurtenant to a house in the parish, the statute was not applied to the acquisition of the right. Evidence of exclusive possession extending beyond living memory, and of repairs of the pew, raised the presumption of a lawful origin of a right to the pew. (Phillips *v.* Halliday). Rights to pews.

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cent land or building.[1] Right to receive light and air laterally by windows or other apertures. [Note 3 (*c*), p. 381, *infra*].

Profits *à prendre* recognized by English law.

Besides these easements, the English law recognizes, among others, the following *profits à prendre*[2]: A right or liberty which one or more may have to feed their cattle on another man's land. The liberty to cut turves in another's soil to be burnt in a house. The right to take trees, loppings, shrubs or underwood in another's woods, coppices, &c. A right to fish in another's pond, pool or river. A right to hunt, shoot fowl, or fish in another's land or water, and to carry away whatever is so taken. A right to dig clay in another's land for the purpose of making bricks. Profits, in English law, are not required to be appurtenant to a dominant heritage.

English law, based on Roman law.

It may be noted here that as the English law of easements is mainly based on the Roman law, so is the Indian law of easements mainly based on the English law. Though the express rules of English law have technically no authority in India, they have been largely borrowed and adopted by the English Judges of our Courts. This borrowing process is an "example of the influence which express written law invariably exercises on unwritten customary law when they are found side by side." "In that large domain of law in which primitive customs give no light and provide no remedy suitable to the circumstances of advancing civilization, the practice of our Courts necessarily and inevitably introduces and fills up the large and wide interstices of that law by an unamalgamated mass of English law." (See Maine's Village Communities in the East and West; Supplement to the *Gazette of India*, 25th February 1882, p. 181).

Indian law, based on English law.

The following are some of the most important easements recognized[3] by the Courts in British India:—

Easements recognized in British India.

(*a*). Rights of way usable for all purposes, and at all times, or limited to particular purposes or to certain times.

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[1] Lemaitre *v.* Davis, 19 Ch. Div., 281.

[2] See Hall on Rights of Common and Profits *à prendre* and Woodfall's Law of Landlord and Tenant, Chap. 18. Rights of Common are *primâ facie* exercisable only over the lord's waste. (Digby, 159).

Profits, easements, and rents.

Easements are rights of accommodation as distinguished from those which are directly profitable. Easements (in the English-law sense of the term) tend rather to the convenience than the profit of the claimant. A profit *à prendre* is so called because the claimant himself is entitled to take the profit, while a rent must be paid or rendered by the tenant. Profits lie *in prender*, rents lie *in render*. See p. 363, *supra*.

Ways.

[3] (*a*). Rights of way—

For foot passengers (see Hamid Hossein *v.* Gervain, 15 W. R., 496). Footway. (Toolseemonee *v.* Jogesh, 1 C. L. R., 425).

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(*b*). Rights to the flow or use of water, and rights to obstruct or divert the natural flow of water. — In British India.

(*c*). Rights to light and air.

For boats over water. (Shaikh Mahomed *v.* Shaikh Sefatoolah, 22 W. R., 340 ; Doorga Churn *v.* Kally Coomar, I. L. R. 7 Calc., 145 ; Koylas *v.* Sonatun, I. L. R., 7 Calc., 132).

For driving cattle (see Joy Doorga *v.* Juggernath, 15 W. R., 295 ; Shaikh Mahomed *v.* Shaikh Sefatoolah, 22 W. R., 240).

For carrying marriage and other processions. (Rajmanick *v.* Ruttan, 15 W. R., 46 ; Lokenath *v.* Monmohun, 20 W. R., 296).

For the passage of *mehters*. (Jadulall *v.* Gopal, I. L. R., 13 Calc., 139, P. C.)

For general purposes. (Lokenath *v.* Monmohun, 20 W. R., 293).

In particular seasons of the year. (Oomur *v.* Rumzan, 10 W. R., 363 ; Koylash *v.* Sonatun, I. L. R., 7 Calc., 132).

(*b*). Rights to the flow and use of water—

To the flow of water through an artificial watercourse. (See Morgan *v.* Kirby, I. L. R., 2 Mad., 46, and the cases cited in foot-note 7, p. 379, *supra*). — Water.

To the egress of surplus water through a watercourse or drain. (Punja *v.* Bai Kuver, I. L. R., 6 Bom., 20 ; Heeralall *v.* Purmessur, 15 W. R., 401 ; Ramessur *v.* Brojo, 25 W. R., 271).

To divert the natural flow of water by dams, &c. (Zamindar of Kurupam *v.* Zamindar of Merangi, I. L. R., 5 Mad., 253).

(There can be no right to throw back the surplus rain-water of defendant's lands on to those lands, and to keep it there till plaintiff required it for his use. Maniyam *v.* Ayya, 7 Mad., 37).

To erect *bunds* to stop the natural flow of water. (Chumroo *v.* Mullick, 18 W. R., 525).

(*c*). Rights to light and air—

(Pranjivan *v.* Mayaram, 1 Bom., 148 ; Puran *v.* Ooday, 3 W. R., 29 ; Mahomed *v.* Jafur, 4 W. R., 23 ; Lackersteen *v.* Tarrucknath, Cory. Rep., 91 ; Bagram *v.* Khetternath, 3 B. L. R., O. C., 18 ; Bhuban *v.* Elliott, 19 W. R., 194, P. C.; Modhoosoodun *v.* Bissouath, 15 B. L. R., 361 ; Nundkishor *v.* Bhagubhai, I. L. R., 8 Bom., 95 ; Delhi and London Bank *v.* Hem Lall, I. L. R., 14 Calc., 839). — Light and air.

Right to air. (Barrow *v.* Archer, 2 Hyde, 125 ; Bagram *v.* Khetternath, 3 B. L. R., 18, 47 ; Modhoosoodun *v.* Bissonath, 15 B. L. R., 361 ; Delhi and London Bank *v.* Hem Lall, I. L. R., 14 Calc., 839, 854). The *English* Prescription Act specially provides for the acquisition of rights to *light*, but makes no mention whatever of *air*. The English law, however, recognizes a right to the *air* which is accustomed to flow to an ancient *window* or other aperture in a building, though it does not recognize a right to the *streams of wind* accustomed to flow to *windmills* and *chimneys*. (Goddard, 3rd Ed., p. 40). The wind which blows over a wide expanse and from various directions and in uncertain streams is of such an indefinite nature that any claim of right to have it uninterrupted is too vague and extensive to be tolerated by the law, so that the right of — Air and wind.

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(*d*). Flumen, stillicidium, and jus projiciendi.

(*e*). Rights of fishing, and of grazing cattle. (Profits *à prendre*).

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neighbours to build on their own land is not affected by mere long enjoyment of such currents of wind. (Goddard, 4th Ed., 42). The uninterrupted flow of air through a *definite* aperture or channel over a neighbour's property is distinguished from the current of *air floating over the whole site* of a neighbour's property. A claim for the enjoyment of air upon the plaintiff's own property is also distinguished from a claim for the passage of air over the defendant's property. (Harris *v.* De Pinna, 33 Ch. D., 238, at pp. 249, 263). In England it was the old practice in *all* suits relating to the interference of *light* to throw in a claim to *air*, as if the two things went *pari passu*, but it has been given up since Lord Selborne made the observations which fell from him in The City of London Brewery Company *v.* Tenant. (*Ibid.*) In the absence of an express grant, the obstruction of our neighbour's prospect or his enjoyment of a south breeze is not actionable, such things being looked upon merely as matters for his delectation or pleasure. (Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, 47). A claim by long enjoyment for the free passage of air to a windmill, or for the free passage of air (to a window) from a particular quarter is not maintainable. (*Ibid.*, pp. 44, 45).

Prospect.

Water in a current.

(*d*). *Flumen.* Right to discharge water from roof, on another's land or house. (Sheonath *v.* Bishonath, 2 Agra, Pt. II, 191 ; Mohaulal *v.* Amratlal, I. L. R., 3 Bom., 174. See p. 378, *supra*).

Water in drops.

Stillicidium from cornices (Lachman *v.* Jamna, I. L. R., 10 All., 162) ; from eaves (Branson's Digest of Unreported but Printed Judgments of the Bombay High Court, 89). See also Akilandammal *v.* Venkata, 6 Mad., 112 ; cf. Lallmonee *v.* Joynarain, 11 W. R., 508. See p. 378, *supra*.

Projecting structures.

Jus projiciendi. (Mohunlal *v.* Amratlal, I. L. R., 3 Bom., 174). Travellers in a baloon can hardly be deemed trespassers on the property of those over whose land the baloon may pass. (See Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, at p. 43). But the column of air resting on the area of one's land and extending indefinitely upwards may be trespassed upon by a neighbour's projecting roof, so that such trespass may constitute, at least, the inchoate enjoyment of an affirmative easement. (Mohunlal *v.* Amratlal. I. L. R., 3 Bom., 174). A tramway in the air, beyond the boundary of the plaintiff's property, is an easement analogous to a right of way. (Harries *v.* De Pinna, 33 Ch. D., 238). But the rights *usque ad cœlum* which attach to land do not attach to an easement on such land. The erection of a portico or verandah, even when it encroaches on part of the space devoted to a way, is not actionable unless it interferes with the reasonable enjoyment of the easement. (Toolseymony *v.* Jogesh, 1 C L. R., 425 ; Clifford *v.* Hoare, L. R., 9 C. P., p. 362).

Fishing and grazing.

(*e*). Rights of fishing *in alieno solo* (see Parbutty *v.* Madhu, I. L. R., 3 Calc., 276 ; Chundee *v.* Shib, I. L. R., 5 Calc., 945 ; Lutchmiput *v.* Sadaullah, I. L. R., 9 Calc., 698 ; Horidas *v.* Mohamed, I. L. R., 11 Calc., 434). See pp. 348—351, *supra*.

Rights of grazing cattle. (Venkatachela *v.* Kuppusami, I. L. R., 11 Mad., 42 ; cf. Collector *v.* Bal Patil, I. L. R., 2 Bom., 110 ; Secretary of State *v.* Mathurabhai, I. L. R., 14 Bom., 213).

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(*f*). Easements for the exit of smoke through apertures in the dominant heritage, whether such apertures are used for the egress of smoke only, or for light and air as well.[4]

(*g*). Customary rights to privacy.

(*h*). Right to hold a *haut*, or set up a ferry, on another's land.

May easements not now known to the law be created?

According to Lord Stair, there may be as many kinds of servitudes as there are ways whereby the liberty of a house or tenement may be restrained in favor of another tenement. But it must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner.[5] There can certainly be no objection for the owner of land to enter into unusual or novel covenants so long as such covenants are enforceable against him and his representatives, that is, so long as they are answerable in damages only for breach of covenant. But it is otherwise where new modes of holding and enjoying land—incidents of a novel kind—are intended to be impressed upon the land itself, so that an unusual and unknown burden is attempted to be imposed on all subsequent owners, whether they are purchasers with notice or not. (As to "covenants running with the land" and "assignees with notice," see note, p. 358, *supra*).

Novel easements.

A man cannot create a new form of estate or alter the line of succession allowed by law.[6] He must be contented to take the sort of estate and the right to dispose of it as he finds the law settled by

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(*f*). Rights for the exit of smoke (see note 4, *infra*).

(*g*). Customary rights to privacy (see Gokal *v.* Radho, I. L. R., 10 All., 358, and the cases cited therein). Customary rights to burn the *holi* or to lay *tazia* on another's land, or to bathe in another's tank, are rights *in gross*. (See p. 45, *supra*). These rights are similar to the right of holding horse-races which was claimed in Mounsey *v.* Ismay, 3 H. and C., 486.

Privacy.

(*h*). Right to hold a *haut* on another's land. (Rajah Bejoy *v.* Obhoy, 16 W. R., 198). Ferries. See note (7), p. 364, *supra*.

Hauts and ferries.

[4] Behari Sahoo *v.* Musst. Ajnas, 6 W. R., 86. But Wilson, J. (on the 14th June 1879), doubted if an easement for the exit of smoke only could be recognized in the Presidency Towns. (See Bhowbany Churan Mitter *v.* Baney Madhub Dey, reported in the *Englishman* of the 11th of July 1879. See also Bryant *v.* LeFevre, 4 C. P. D., 172). The civil law recognized the *jus fumi immittendi*. Mears' Ortolan, p. 178.

Smoke.

[5] *Per* Lord Brougham in Keppel *v.* Bailey, 2 M. and K., at p. 535; Gale, 6th Ed., p.19 (note); Goddard, 3rd Ed., p. 18.

[6] Denobundhoo *v.* Soorjomonee, 4 W. R., P. C., 114; Tagore *v.* Tagore, 18 W. R., 359, 364, P. C.

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decisions or controlled by Act of the Legislature.[7] Mr. Goddard, in his treatise on the law of easements, points this out, and remarks that the law will not recognize any new species of easements, that is, it will not permit a landowner to create easements of a novel character, and annex them to the soil.[8] The learned author remarks that a right to uninterrupted prospect (or view from a house), or a right to the unobstructed view of a house or shop window, or a

Right to prospect and right to privacy.

[7] Hill *v.* Tupper, 32 L. J., Exch., 217, cited in Goddard on Easements, 2nd Ed., p. 21 ; 3rd Ed., p. 28, and Gale, 6th Ed., p. 284. "A person cannot create by grant new rights of property, so as to give the grantee a right of suing in his own name for an interruption of the right by a third party." If a riparian proprietor grants away that portion of his estate which does not abut on the river, the grantee cannot acquire any water-rights against third persons, even if the grantor makes an express grant of such rights in his favor. All such riparian rights are entirely derived from possession of land abutting on the river, and cannot be transferred apart from such land, so as to be made rights in gross. (Stockport Co. *v.* Potter, 2 H. & C., 300). Water-rights are very often natural rights. In the case of easements it has been distinctly decided that a right unconnected with the enjoyment or occupation of land cannot be annexed as an incident to it, and that an easement cannot be severed from the dominant tenement and made a right in gross (Goddard, 4th Ed., pp. 11 and 12). It is otherwise with profits *à prendre* according to English law. An alienation of the lands to which a several (*i.e.*, exclusive) fishery is appurtenant cannot have the effect of extinguishing the fishery, which (unless it passes by the conveyance to the alienee) must remain in the proprietor previously entitled to it as a fishery in gross. (Neill *v.* Duke of Devonshire, 8 App. Cas., 135, at p. 153). This rule as to profits may be adopted in Bengal, the Panjab, Assam, Ajmir, and British Burmah, to which Provinces the Easements Act (sec. 21) has not yet been extended. See note (5), p. 358, note (6), p. 389, and p. 392, *infra*.

Profits in gross in England.

[8] Goddard, pp. 21—23, 73, 74 ; 3rd Ed., pp. 28—30, 104, 105. The following passage from the report of the Law Commission (*Ind. Gaz.*, 17th January 1880) may be referred to in connection with this subject :—

"Easements, being restrictions on the free use of property in others, are regarded with disfavor by the law ; and sec. 7 of the Bill was accordingly framed so as to state the fact that all easements are in derogation of certain natural rights, and to prevent attempts to create new kinds of easements, it enumerated the rights, of one or other of which, every easement must be a restriction, and thus intentionally excluded every kind of servitude not now known to the law. This, however, has been objected to on the ground that there may be in some parts of India rights not so enumerated. We admit the possibility, though not the probability, of the existence of such rights ; and we recommend that section 7 should be modified as follows : . . . . " (The modified sec. 7 has been substantially enacted into law. See Act V of 1882, sec. 7). "Should, for instance," the Commissioners add, "a natural right to lateral access of light or air, or to the non-diminution of the supply of fish, be hereafter established in any part of India, the section as now modified will not exclude an easement, in derogation of such right."

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right to undisturbed privacy, cannot, on this principle,[9] be acquired in England except perhaps by an

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[9] See Goddard, 4th Ed., pp. 106—112; Gale, 5th Ed., pp. 322—324. But the right to undisturbed privacy is recognized by the Hindu law, the civil law, and the customs of Guzerat and other places in India. (See Gokal Prasad *v.* Radho, I. L. R., 10 All., 358), and the right to uninterrupted prospect is not unknown to the civil law. One reason why the former right is not enforced in England is, that in cases of interference, the claimant has an easier remedy in his own hands. Holloway and Innes, JJ., applying the law of Westminster Hall and the House of Lords, held that there is in India no right of privacy, the interference with which is a wrong for which a remedy is given. (Kamathi *v.* Gurunada, 3 Mad., 141). In Mahomed Abdur *v.* Brijut, 5 B. L. R., 676, Markby, J., expressed a similar opinion, and added that the recognition of such a right would lead to the most alarming consequences to the owners of house-property in towns. In Gokal Prasad *v.* Radho, Sir John Edge, C. J., reviewed all the cases on the subject, and held that a customary right of privacy under certain conditions exists in India and in the North-Western Provinces, and is not unreasonable, but merely an application of the maxims *sic utero tuo ut alienum non lædas*, and *ædificare in tuo proprio solo non licet quod alteri noceat*. A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action. Each case in which such a right is in dispute must be decided upon its own facts, the primary question in all cases being, whether the privacy in fact and substantially exists, and has been in fact enjoyed. If this is answered in the negative, no further question arises. If, in the affirmative, the next question is, whether the privacy has been substantially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against such acts.

Rights to privacy under the old law.

Customary right of privacy.

It is more reasonable to hold that a neighbour should not be allowed to erect new buildings or to open or extend doors or windows in old buildings in such a way as would substantially interfere with those parts of his neighbour's house or premises which are used by *purda-nashin* women of the latter's family, than to hold that the latter's only remedy is to build a wall on his own land or to screen his windows with the probable result of depriving his house of light and air.

In the case of a building for *purda* purposes, newly erected without the acquiescence of the owner of an adjacent building site, a custom preventing such owner from so building as to interfere with the privacy of the building already erected, would be unreasonable, and consequently bad in law. But if such owner, without protest or notice, allowed his neighbour to erect and consequently to incur expenses in connection with a building for the use of *purda-nashin* women, a custom preventing the former from interfering with the privacy of such new building would not, in India, be unreasonable. (Gokal Prasad *v.* Radho, I. L. R., 10 All., 358). Act V of 1882, sec. 18, illustration (*b*), apparently goes further than the rule laid down here. The illustration does not show that the non-acquiescence of the servient owner invalidates the custom.

When such customs are reasonable and when unreasonable.

Under Act V of 1882.

A prescriptive right to prospect is disallowed in England, because it is vague, undefined, and too extensive. The same objection applies to a claim to have free access for all the winds of heaven to the sails of a windmill (Webb *v.* Bird), or to a claim to the use of percolating water not accustomed to run in a definite channel (Chasemore *v.* Richards). See Dalton *v.* Angus, 6 App. Cas., at pp. 759 and 824. Sir Barnes Peacock, C. J., said: "The enjoyment of unobstructed prospect is merely

Right to prospect, to all the winds, and to percolating water.

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actual agreement or covenant, and that even when so acquired, it should be treated not as an easement annexed to the land for ever, but merely as a personal right for the infringement of which no action can be maintained as for a tort.[10] A right of way, not connected in any manner with the enjoyment of the land to which it is attempted to make it appurtenant, purporting to be at the same time, in gross and appurtenant, is a novel kind of estate which cannot be recognized by law, though such a right in gross *simply*, may be as valid and perhaps as binding as an easement properly so called.[1] The Indian Easements Act, which is mainly based on the law of England, excludes such a right from the category of easements. An easement, according to the

Right purporting to be real and personal at the same time.

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a matter for the delectation or pleasure of the owner of the dominant house, and no action lies for a nuisance to (what in Aldred's case, 9 Coke's Rep., 58, is called) the *delectatio inhabitantis*." (Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, at p. 47).

[10] Goddard, 4th Ed., p. 106.

[1] Ackroyd *v.* Smith, as explained by Mr. Willes. See Gale, 5th Ed., p. 13, note (*d*). The remedies for the disturbance of a right in gross are perhaps the same as those for that of an easement proper. *Ibid.*; Austin, Vol. II, pp. 831, 850.

Points of difference between the English and the Indian law.

[2] The following points of difference are noticed in the Statement of Objects and Reasons :—

(*a*).—In conformity with continental systems of jurisprudence, but in contravention of the English law, easements under Act V of 1882 include profits *à prendre* when they are appurtenant to some heritage. (Such profits *à prendre* may here be acquired by custom). (Secretary of State *v.* Mathurabhai, I. L. R., 14 Bom., 213 ; and pp. 357 and 358, notes, *supra*).

(*b*).—A customary easement to restrain interference with privacy is recognized by the Indian Act. (See Gokal Prasad *v.* Radho, I. L. R., 10 All., 358, and the Bombay cases cited therein).

(*c*).—The express imposition of an easement in British India need not be evidenced by writing. (Krishna *v.* Rayappa, 4 Mad., 98). (This is still the law in Bombay, the Panjab, and Burmah, but it is otherwise in Provinces where the Transfer of Property Act, IV of 1882, applies. (See secs. 54 and 126 of that Act, and Michell, p. 24).

(*d*).—In British India there is no rule, that a way of necessity (once set out) shall not be varied save with the consent of both dominant and servient owners, or unless the servient owner renders it impassable. (See Goddard, 3rd Ed., p. 380).

(*e*).—Under 2 and 3 Will. IV, c. 71, where the user of an affirmative easement has continued for twenty years only, the fact that the servient owner was ignorant of the user, or was incapable of resisting it is a good defence. In no case of prescription under the Indian Act is ignorance or incapacity a good defence. (See Arzan *v.* Rakhal, I. L. R., 10 Calc., 214).

(*f*).—The Indian Act favors the right to air as much as the right to light. It allows a suit for the obstruction of the passage of air where it interferes materially with the plaintiff's physical comfort, although it is not injurious to his health.

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Act, must be of some advantage to the dominant heritage, and not merely to the owner of an heritage with which the easement is wholly unconnected. It must be beneficial to the occupation or enjoyment of the land or tenement to which it is appurtenant. A man cannot make a right of way over land in Dacca appurtenant to an estate in Jessore. Such a right might be granted as a right in gross, but it would not pass with the occupation of the dominant heritage as appurtenant,[3] and is not an easement properly so called. It is assumed in

Real easements benefit *the land*.

(As to the old law in British India, see Bagram *v.* Khetternath, 3 B. L. R., O. C., 18; and Modhoosoodun *v.* Bissonath, 15 B. L. R., 361).

Points of difference between English and Indian law.

(*g*).—Under the Act, the dominant owner cannot himself (except perhaps where there is a contrary local usage) abate a wrongful obstruction of an easement. (7 Mad. Rulings, XXXV). But cf. Chunder *v.* Koylash, I. L. R., 7 Calc., 665, 673. As to the right of the servient owner to obstruct the excessive user of an easement, see the latter end of this Lecture).

(*h*).—In the case of the acquisition of any easement by statutory prescription in British India, it is not assumed that a grant has been made by the servient owner. In English law, prescription generally presumes a (real or fictitious) grant. Prescription at common law, prescription by the theory of a lost grant, and prescription by twenty years' user of easements (other than the right to light) under the statute assumes such a grant. No prescription arises in these cases if a grant is impossible. The servient owner's ignorance of the user is, therefore, fatal to a claim by such prescription in England. It is said that the right to light is the subject, not of grant, but of covenant; but Lord Selborne is of opinion that a right to light may be granted in the sense of the word 'grant' necessary for prescription. See Dalton *v.* Angus, 6 App. Cas., 740, at p. 794, and Arzan *v.* Rakhal, I. L. R., 10 Calc., 214, 218.

(*i*).—The Indian Act lays down positive rules for the extinction of prescriptive and other easements, by non-user for twenty years. (For the old law here, see Hureedass *v.* Jodoonath, 5 B. L. R., App., 66; 14 W. R., 79; and latter end of this Lecture).

(*j*).—Under the Indian Act, alteration of the mode of enjoyment of any easement by an attempt to usurp a greater right than the dominant owner is entitled to, does not in any case suspend the original right till the dominant heritage is restored to its original condition. Such encroachment or excess of user may, under certain circumstances, extinguish the right altogether. (For the English law, see Gale, pp. 613 *et seq*, and Goddard, pp. 224, 360; 3rd Ed., pp. 326, 489).

(*k*).—Where reasonable notice of the discontinuance af an easement has not been given to the servient owner, he is entitled to compensation for damage caused to the servient heritage by such discontinuance. For the English law, see L. R., 6 Q. B., 578.

It may be added that the doctrine of implied reservation of *quasi*-easements in favor of the grantor (recognized by sec. 13, cl. (*d*) of Act V of 1882) has been declared to be overruled in England. (Wheeldon *v.* Burrows, L. R., 12 Ch. Div., 31; Gale, 6th Ed., p. 131).

[3] Bailey *v.* Stevens, 31 L. J., C. P., 226; Goddard, pp. 14, 15; 3rd Ed., 18.

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several cases in England,[4] that a right to undisturbed privacy or prospect may be acquired by actual grant or covenant, and there is nothing in the Indian Act to prevent such acquisition. It must be remembered, however, that all rights are not easements, and that all possible easements are not capable of being acquired by prescription under the Indian or the English law.[5]

Indian statutory law before 1882 almost wholly silent on the subject of easements.

The operation of the Indian Easements Act (V of 1882), which came into force on the first day of July 1882, was at first confined to the Presidency of Madras, the Central Provinces, and Coorg. By Act VIII of 1891, which was passed on the 6th of March 1891, the Easements Act was extended to the Bombay Presidency, the North-Western Provinces, and Oudh. The Act now applies to the whole of British India, except the Lower Provinces of Bengal, the Panjab, Assam, Burmah, and Ajmir. Before the 17th February 1882, when the Easements Act was passed, Indian statutory law was silent on the subject of easements, except so far as regards certain disputes concerning them, their acquisition by prescription, the limitation of suits for disturbing them, the granting of injunctions to prevent such disturbance, and their non-transferability apart from the dominant heritage. In most of the earlier Acts even the term Easement is not used, but the rights denoted by the term are referred to by the expression "the right of use of any land or water" or "benefits to arise out of land."[6]

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[4] Tudor's Leading Cases, 263; Goddard, pp. 75, 79; 3rd Ed., pp. 106, 109.

Rights which cannot be acquired by prescription.

[5] For the restrictions under the Indian law, see sec. 17, Act V of 1882. For the English law as to prospect, see Attorney-General *v.* Doughty, 2 Ves. Sen., 453. See also Webb *v.* Bird, 13 C. B., N. S., 841 (free access to a windmill for all the winds of heaven); Chasemore *v.* Richards, 7 H. L. C., 349 (percolating water); Bryant *v.* LeFevre, 4 C. P. D., 172 (free access of air to and from a chimney); Lord Rivers *v.* Adams, 3 Exch., 361 (right of an indefinitely large number of persons to a profit *à prendre*); 1893, 3 Ch., 48 (qualified or defeasible easements).

Provisions of the earlier Acts.

[6] Sec. 320 of Act XXV of 1861, Criminal Procedure Code, empowered the Magistrate to enquire into disputes concerning "the right of use of any land or water," and to pass certain orders on the subject. The corresponding section of Act X of 1872 (sec. 532) spoke of disputes concerning the right of use of any land or water, or any right of way. And now sec. 147 of Act X of 1882 refers to these disputes, as disputes concerning "the right to do or prevent the doing of anything in or upon any tangible immoveable property."

The Registration Acts, XX of 1866, VIII of 1871, and III of 1877, define 'immoveable property' as including "rights to ways, lights, ferries, fisheries or any other benefit to arise out of land." (Ferries are very often neither easements nor profits *à prendre*, but they are incorporeal rights bearing some resemblance to easements and profits). See pp. 362—364, *supra*.

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The Bill for the limitation of suits, drafted by the Indian Law Commissioners* in 1842-3, and amended by Sir James Colvile in 1855-9, proposed two simple rules for the acquisition and extinction by prescription of "rights to benefits, liberties or privileges derived out of the immoveable property of another person."[7] These rules were intended to apply to servitudes appurtenant

Limitation Bills, 1842—59.

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* The General Clauses Act (I of 1868) defines 'immoveable property' as *including* "benefits to arise out of land." Mr. Justice Pigot is of opinion that this definition includes profits *à prendre*, but not mere easements or conveniences. (See Fadu *v.* Gour, I. L. R., 19 Cal., 544, 553). It may be remarked, however, that the definition does not purport to be exhaustive, and does not exclude any right or interest signified by the term in its ordinary meaning. (See Rodger *v.* Harrison, 1893, 1 Q. B., p. 167, and Empress *v.* Ramanjiyya, I. L. R., 2 Mad., 5). Before the General Clauses Act of 1868, the term comprehended, at least, all that would be "real" property according to English law, and, therefore, all easements and servitudes which are incorporeal hereditaments. (See 21 W. R., 178, 181, P. C., and p. 205, *supra*). And it has been held in Madras that the term "immoveable property" in the Act of 1868 includes ferries and all incorporeal rights in immoveable property. (See Krishna *v.* Akilanda, I. L. R., 13 Mad., 54).

Statutory law before 1882.

Sec. 7 of the Court Fees' Act (VII of 1870) lays down that in suits for "a right to some benefit to arise out of land" the amount of fee payable under the Act shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The marginal note to sec. 7 shews that the Legislature itself uses the term "easements" to denote "rights to some benefit to arise out of land."

Part III of the Specific Relief Act (I of 1877) lays down rules for the granting of an injunction where the defendant invades or threatens to invade the plaintiff's "right to, or the enjoyment of, property," and the illustrations to secs. 54 and 55 show that an injunction may be granted to prevent the disturbance of easements.

Sec. 6 of the Transfer of Property Act (IV of 1882) enacts that "an easement cannot be transferred apart from the dominant heritage." It may be doubted if the term easement in Act IV includes a profit *à prendre*. The principle of the rule laid down in sec. 6 read with sec. 21, Act V of 1882, is that an easement cannot be severed from the land to which it is annexed and made a right *in gross*. (See Goddard, p. 10). Profits *à prendre may*, in England, be enjoyed by the former proprietor as rights in gross. The same rule will probably prevail in Bengal, Assam, and other places to which the Easements Act has not been extended. See p. 383, note (7).

Sec. 40 of Act IV of 1882 shows that an obligation imposing a restriction on the use of immoveable property, or annexed to the ownership of such property, does not necessarily amount to an 'easement.'

Acts IX of 1871 and XV of 1877 speak of the acquisition of easements, and of suits for compensation for obstructing certain easements.

[7] Secs. 4 and 5 of the amended Limitation Bill presented to the Council on the 8th of January 1859, ran as follows :—

"IV.—Subject to the exceptions and with the qualifications hereinafter mentioned, whoever has enjoyed, mediately or immediately, any benefit, liberty, or privilege, derived out of the immoveable property of

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as well as to servitudes *in gross*. But they were all omitted when the Bill was passed into law.[8] Rules for the acquisition of easements by positive prescription were first introduced by Act IX of 1871, and they were extended by Act XV of 1877 to the acquisition of profits *à prendre*.[9] For the territories respectively administered by the Governor of Madras in Council, the Governor of Bombay in Council, the Lieutenant-Governor of the North-Western Provinces, the Chief Commissioners of the Central Provinces, Oudh, and

The Indian Easements Act, 1882.

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another, or affecting such immoveable property or any right of ownership over the same, for the space of twelve years without interruption, shall acquire by prescription, both at law and in equity, a right to the enjoyment of such benefit, liberty or privilege as against the owner of such immoveable property, unless such benefit, liberty or privilege shall have been enjoyed by some consent or agreement expressly given or made for that purpose by some deed or writing."

"V.—If the perpetual right to any such benefit, liberty or privilege as in the last preceding section mentioned, whether acquired by prescription or otherwise, shall have been disused for twelve years when it was capable of being used, the same shall be extinguished."

[8] See p. 52, *supra*.

[9] See pp. 55, 56, *supra*.

Meaning of "easement" in Acts IX and XV.

It may be here remarked that, under Act IX of 1871, in the absence of a definition of 'easement,' Sir Richard Garth, C. J., adopted Mr. Gale's definition of the term, and held that the right to fish in a river or other water was not an easement. (Parbutty *v.* Mudho, I. L. R. 3 Calc., 276). But under Act XV of 1877 it has been held by White, J., that by force of the interpretation-clause, sec. 3, the word 'easement,' has a very much more extensive meaning than what it bears in the English law, and that it includes profits *à prendre*, whether appurtenant or *in gross*. (Chundi *v.* Shib, 6 C. L. R., 269; S. C. I. L. R., 5 Calc., 945). Looking to the definition of 'easement' in Act V of 1882, and the total repeal (of the provisions as to easements) of Act XV of 1877, so far as the provinces to which Act V of 1882 applies, are concerned, it may be doubted if the Legislature intended that Act XV should apply to the acquisition of any servitudes in gross. Profits in *gross* are not governed by the English Prescription Act, but this is owing to the language of the forms of pleading prescribed by that Act. See Gale, p. 178. In the Indian Act, XV of 1877, there are no words to restrict its operation to profits appurtenant, and it has been held that profits in gross may be acquired by long enjoyment under that Act. But as to servitudes in gross not amounting to profits, it may still be held that Act XV does not apply to them. See p. 348, *supra*.

Profits in gross may be unlimited in extent.

Profits appurtenant are necessarily limited to the wants of the tenements to which they are appurtenant. Profits in gross are not so limited. A right to take all the wood in a certain close may lawfully exist as a profit *à prendre* in gross. But such a right cannot be claimed as appurtenant to land, because it is in its nature wholly unconnected with the enjoyment of the supposed dominant tenement and its necessities. (See Shuttleworth *v.* Le Fleming, 34 L. J. C. P., 309, at p. 311).

Difficulty of proving heritable quality of rights in gross.

Some difficulties would arise as to the evidence necessary to establish the nature and quality of rights in gross which do not occur in the case of rights appurtenant to a particular tenement, as, for instance, whether twenty years' enjoyment by one man in the course of his own life, and no more, would establish any right, either a

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Coorg, Act V of 1882 (as extended by Act VIII of 1891), provides rules for the acquisition and extinction of easements by prescription.[10] Act V also deals with the imposition and transfer of easements, and of the other means of acquiring and extinguishing easements. It further treats of the incidents of easements, their disturbance, suspension, and revival. Although the Act is not in force in the Lower Provinces of Bengal, the Panjab, Assam, Ajmir, and Burmah, it is on the Indian statute-book, and will, (according to Sir Henry Maine), serve as a magazine of rules to courts and lawyers everywhere in India.[1]

Easements have a *special* origin.

The natural rights of the owner of a plot of land, over the contiguous lands of others, are not held by a distinct title, but as incidents to the land itself.[2] They are given as of common right; it is not necessary either in pleading to allege, or in evidence to prove, any special origin for them; the burthen, both in pleading and in proof, is on those who deny their existence in the particular case.[3] Easements, so far as the dominant owner is concerned, are enlargements, and so far as the servient owner is concerned, restrictions either of natural rights or of the ordinary rights of property.[4] An easement, as distinguished from a natural right, has a special origin, and is held by a distinct title. An easement being a specially acquired right, the burden of proving it lies on the party alleging the existence of such a right.[5]

Burden of proof.

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right in that man for life, or a descendible right in gross, although there might be nothing in the nature of his single enjoyment to indicate perpetuity. (*Ibid.*, p. 312). Where the claimant prescribes in himself and his *ancestors*, these difficulties do not arise. The English Prescription Act, and the Indian Easements Act, do not apply to easements or profits in gross. If Act XV of 1877 be held applicable to easements in gross, twenty years' enjoyment by the claimant himself in the course of his own life would give him a descendible right in gross. This difficulty did not arise in the case of Chundee *v.* Shib, I. L. R., 5 Calc., 945, and was not considered by the Court.

[10] See secs. 15, 16, 17, and 47.

[1] See the report of the speech of the Law Member in the Legislative Council, 16th February 1882.

[2] See Angus *v.* Dalton, 6 App. Cas., 740, 791.

[3] 6 App. Cas., at p. 809.

[4] See pp. 353, 354, *supra*. The right of the riparian landowner in respect of a natural stream is natural; that of the millowner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is an easement. The right to the vertical access of light and air is an ordinary right of property, but the additional right to the lateral access of light and air is an easement. The right to exclude strangers from my land is an ordinary right of property, which is restricted by strangers acquiring an easement of way over it.

[5] Harimohun *v.* Kissen Sundary, I. L. R., 11 Calc., 52; Obhoy *v.* Luckhee, 2 C. L. R., 555; Onraet *v.* Krishna, 15 W. R., 83.

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Modes of origination.

Omitting the exceptional cases of easements imposed by, or acquired under, an Act of the Legislature, or a decree of a Court of Justice, easements come into existence in one of the following modes or ways :—

I. By express grant or imposition. II. By implied grant or imposition. III. In virtue of a local custom. IV. By estoppel. V. By prescription. VI. By the presumption of some lawful origin from the fact of long enjoyment.

I. Express grant of new easements.

I. Easements are sometimes constituted by an express grant[6] from the owner of one heritage (the servient), in favor of the owner of another (the dominant). Such grant may be either *inter vivos* or by testament.[7] The transfer of the dominant heritage passes an easement already in existence unless a contrary intention appears.[8] It appears from sec. 8, cls. 2 and 4 of the Transfer of Property Act, and sec. 19 of the Easements Act, that the owner of the dominant heritage may, when he transfers that heritage, expressly exclude the easements annexed to that heritage from the operation of such transfer. According to sec. 6 of the Transfer of Property Act, the easements themselves cannot be transferred apart from the dominant heritage. But there is nothing in these sections which precludes the dominant owner from retaining or reserving the easements, and transferring the land or heritage without its appurtenances. In Madras, Bombay, the North-Western Provinces, and other places to which the Easements Act has been extended, the rights so retained or reserved cease to be easements, and cannot be used after the transfer of the dominant heritage.[9]

Implied grant of existing easements.

Apportionment.

An easement already in existence is apportioned if the dominant heritage is divided among several persons, provided

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[6] The servient owner may expressly impose a servitude on his heritage by a grant. It is said that the negative easement of light is the subject, not of grant, but of covenant. But it is by no means impossible for the owner of the servient heritage to grant a right of unobstructed passage of light in a certain and defined course over such heritage to particular apertures in the dominant tenement. (Angus *v.* Dalton, 6 App. Cas., 794). In English law, a grant of an easement must be made by deed. The use of the word "grant," however, is not necessary. An agreement under seal might operate as a "grant" if the intention to grant were manifested. Goddard, 3rd Ed., p. 139. This was the law even before the passing of the Conveyancing Act, 1881. In the Panjab, Bombay, and Burmah, where the transfer of Property Act does not apply, it is not even necessary that the express imposition of an easement should be in writing. See Krishna *v.* Rayappa, 4 Mad., 98. In other Provinces of British India, a grant of an intangible thing like an easement must be made by a registered instrument. (Secs. 54 and 123 of Act IV of 1882).

Grants how made in England and in India.

[7] Innes' Digest, 3.

[8] Gale, p. 88 ; sec. 19, Act V of 1882 ; sec. 8, Act IV of 1882 ; sec. 6 of the English Conveyancing Act, 1881.

[9] Sec. 21, Act V of 1882 ; p. 383 (note), *supra*.

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the apportionment does not impose an additional burthen on the servient heritage.[10]

II. Many easements are acquired by an implied grant or reservation arising out of an express grant of a tenement or heritage. Easements imposed in this way are either "easements of necessity," or *quasi*-easements arising from the disposition or arrangement of the owner of several heritages—that is, arising from what the Code Civil calls *destination du père de famille*. The rights so implied out of an express grant become easements upon the severance of a heritage or the transfer of one of several heritages by the owner. Before the severance or the transfer, such rights have no legal existence as easements properly so called.[11] II. Implied grant or reservation of new easements.

The law presumes that when a person transfers a part of his property to another, it is the intention of the parties that the transferee should have the means of using the thing transferred, and therefore that he should have all rights and powers in or over the transferor's other property which might be requisite for his purpose.[12] The same principle has been extended by the Easements Act (notwithstanding Lord Westbury's disapproval of the extension) to the case of easements necessary to the transferor in respect of the property retained by him.[1]

Easements over the grantor's other property, if they are necessary to render the tenement transferred capable of enjoyment, are easements of necessity. Similarly, easements over the transferred tenement, if they are necessary for enjoying the remaining property of the grantor, are also easements of necessity. These easements are presumed to have been impliedly granted or reserved by the grantor, for without such easements the enjoyment of the severed portions for the intended purposes cannot be had at all.[2] Easements of necessity.

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[10] Gale, pp. 88 and 569. See also sec. 30, Act V of 1882, and p. 372, *supra*.

[11] No man can have an easement or servitude in a thing of which he himself is the owner.—*Nulli res sua servit.*

[12] The grant of a thing passes everything included therein, without which the thing granted could not be had. (Rolle's Abridgement). An easement of necessity over the grantor's other lands passes as an incident to the grant; for without it he cannot derive any benefit from the grant. (See Wutzler *v.* Sharpe, I. L. R., 15 All., 278, at p. 291). It is well settled that the words of a deed executed for valuable consideration ought to be construed as far as they properly may in *favor* of the *grantee*. (Per Lord Selborne, in 8 App. Cas., 135, at p. 149).

[1] Statement of Objects and Reasons appended to the Indian Easements Bill.

[2] See Gale, pp. 96, 131; Goddard, 2nd Ed., pp. 26, 101, 217; sec. 13, Act V of 1882, Illustrations (*a*), (*b*), (*g*), (*i*), (*j*), (*k*), (*l*), (*m*), and (*n*).

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Easements of necessity very often arise at the time of the severance. But some easements of necessity exist as *quasi*-easements before the severance,—that is to say, as conveniences to which an owner finds it absolutely necessary to subject one part of his property for the benefit of another.

Instances of easements of necessity.

The following are some instances of easements of necessity:—

A sells *B* a field (then used for agricultural purposes only). It is inaccessible except by passing over *A's* adjoining land or by trespassing on the land of a stranger. By an implied *grant*, *B* is entitled to a right of way (for agricultural purposes only) over *A's* adjoining land to the field sold. In the same case, if the adjoining land retained by *A* is inaccessible except by passing over the field sold to *B*, *A* is entitled, by an implied reservation, to a right of way over *B's* field to the land retained.

A, the owner of a house, sells *B* a factory built on adjoining land. By an implied grant *B* is entitled, as against *A*, to use the factory and pollute the air, when necessary, with smoke and vapours from the factory.

A, the owner of two adjoining buildings, sells one to *B*, retaining the other. *B* is entitled, by an implied grant, to a right to lateral support from *A's* building; and *A* is entitled, by an implied reservation, to a right to lateral support from *B's* building.

The same principle applies to cases in which property is severed by a partition or by a compulsory acquisition under the Land Acquisition Act, 1870. Where the taking of a part of a person's land for public purposes, *e.g.*, for building a hospital, cuts off all access to the rest of his land, he will be entitled to a right of way over the land taken, which can only be effaced by giving him compensation for the remaining portion of his land. (Branson's Digest of Unreported but Printed Judgments of the Bombay High Court, p. 91).

Nature of easements of necessity.

It must not be supposed that whenever a man has not another way he has a right to go over his neighbour's land. An easement of necessity is a thing founded on (an implied) grant or reservation. A landowner cannot create a way of necessity over his *neighbour's* soil by any act of his own. See Goddard, p. 218. A right of way arising on a grant of land as an easement of necessity is a way which in law is necessarily implied to be granted or reserved on the severance of land when the property granted or reserved out of a grant cannot be enjoyed except by a way over land of the grantor in the one case or over land of the grantee in the other. A way of necessity would in the former case necessarily pass as an incident to the grant, and in the other case as incident to the reservation. (Wutzler *v.* Sharpe, I. L. R., 15 All., 278, at p. 290). It is clear on the authorities in England, that the grantee can claim only *one* way of necessity, and that the grantor has the right of electing it. (See Bolton *v.* Bolton, 11 Ch. D., at p. 971; Esubai *v.* Damodar, I. L. R.,16 Bom., 552, at p. 558. See also sec. 14, Act V of 1882. It is just *possible* that in India, one way for *mehters* and sweepers, and *another* way for high-castemen may be considered *absolutely necessary* in some cases. (See I. L. R., 16 Bom., 552, at pp. 559, 560). Where there is no *absolute* necessity for the using of the way claimed by the grantee over the grantor's land, where there is another way to the land granted, though such way is much more inconvenient, the way claimed is not an easement of necessity. (I. L. R., 15 All., pp. 281, 292).

Only one way of necessity.

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Besides these, there may be other conveniences for which the owner makes one part of his property dependent on another. These conveniences, or *quasi*-easements, arise from the arrangements, which the owner makes for the use of the several parts of his estate before they become the property of different owners.

Quasi-easements. Disposition of owner of two tenements.

"The appointment of the father of a family," says the Code Napoleon,[3] "is equivalent to a deed as regards continuous and apparent servitudes." According to the English law and the Indian Easements Act, *quasi*-easements, if apparent and continuous, and necessary for enjoying property as it was enjoyed when it was separated by grant, are, in the absence of a stipulation to the contrary, impliedly granted as easements on the severance of the property.[4] In British India, or, at least, in those parts of British India

Quasi-easements when impliedly converted into new easements.

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[3] Art. 692. Before the original heritage becomes the property of different owners by alienation or partition, the service which one part derives from the other is simple *destination du père de famille*. After the severance, the service becomes an easement. Gale, p. 97. The rule of law, as understood by the French legal title mentioned above, was acted upon by Glover and Mitter, JJ., in Amutool *v.* Jhoomuck, 24 W. R., 345. See also Hurre *v.* Hem, 22 W. R., 522; Morgan *v.* Kilby, I. L. R., 2 Mad., 46; Charu *v.* Docowri, I. L. R., 8 Cal., 956.

[4] Existing easements (proper) annexed to the property to be transferred, being legal incidents of such property, pass to the transferee, although such easements are not expressly granted by the deed of transfer. They pass by implication, as legally appurtenant to the main subject of the transfer. The creation of an easement of necessity, or the conversion of a *quasi*-easement into a new easement by implied grant is a different matter. In Charu *v.* Docowri, I. L. R., 8 Calc., 956, Mr. Justice Field, referring to such an implied grant of the use of a path and ghât over the plaintiff's land, says: "This implied grant might arise in one of two ways—(1) the use of the path and ghât might be absolutely necessary to the enjoyment of the defendant's tenement, in which case there would be an easement of necessity; (2) the use of the path and ghât, though not absolutely necessary to the enjoyment of defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance, and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with defendant's tenement." As pointed out by Edge, C. J. (in Wutzler *v.* Sharpe, I. L. R., 15 All., 270, at pp. 292 and 298) the way over the path and ghât in the case of Charu *v.* Docowri, could not be a continuous easement. But the principle that a grant may be presumed in cases of apparent and continuous easements is unassailable. It would thus appear that the law as to implied grants of apparent and continuous easements (such as drains and sewers) in favor of the transferee is the same even in Provinces to which the Easements Act has not been extended. But as a grant is always construed in favor of the grantee and against the grantor, the English law, and perhaps the law in places to which the Easements Act has not been extended, do not recognize the implied reservation of a *quasi*-easement in favor of the grantor,

Implied grants—of existing easements.

—of new easements.

Implied reservation of new easements.

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to which Act V of 1882 applies, such *quasi*-easements over the transferred heritage are also, under similar circumstances, impliedly reserved in favor of the transferor. But *quasi*-easements, which are discontinuous or non-apparent, do not pass, unless the owner by appropriate language shows an intention that they should pass to the grantee of the *quasi*-dominant portion, or be reserved to himself notwithstanding the grant of the *quasi*-servient portion. As regards the implied *reservation* of apparent and continuous *quasi*-easements, the Indian Act follows the decision in *Pyer* v. *Carter*, 1 H. and N., 916; and *Watts* v. *Kelson*, L. R., 6 Ch., 166, rather than Lord Westbury's decision in *Suffield* v. *Brown*, 33 L. J., Ch. 249. It may be noted, however, that *Pyer* v. *Carter*, so far as it rested upon the doctrine of implied reservation, pure and simple, has, in England, been declared to be overruled. (See *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. Div., 31; Gale, 6th Ed., p. 131). And in *Russel* v. *Watts*, 10 App. Cas., 590, at p. 598, the House of Lords recognized the correctness

Where *express* words are necessary.

Implied reservation, under Act V.

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except perhaps where there is positive proof that the grantor must have intended to reserve the right. (See Thomas v. Owen, 20 Q. B. D., 225). In the Easements Bill easements of necessity were described as easements which were absolutely necessary for the enjoyment of the severed property, but in Act V of 1882 easements of necessity are described as easements which are necessary for the enjoyment of the severed property. See sec. 13.

The following are instances of *quasi*-easements (arising out of the disposition of the father of the family or the owner of the heritages), which become easements on the severance of the heritages, either by an implied grant or an implied reservation :—

Instances of *quasi*-easements converted into new easements.

A sells *B* a house with windows overlooking *A's* land, which *A* retains. The light which passes over *A's* land, to the windows (though not absolutely necessary for enjoying the house) is necessary for enjoying the house as it was enjoyed when the sale took place. *B*, as the present owner of the *quasi*-dominant tenement, acquires, by an implied grant, an easement to the access of light over the land which *A* retains. The same principle applies if the land is at the same time sold to a third person. If, again, the adjoining land is sold to *B*, and the house is retained by *A*, an easement of light is, by an implied reservation, acquired by *A* over the *quasi*-servient land now owned by *B*. (For the English law on the subject of implied reservation, see Wheeldon v. Burrows, 12 Ch. Div., 31).

A, the owner of two adjoining houses, *Y* and *Z*, sells *Y* to *B*, and retains *Z*. *B* is entitled, by an implied grant, to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Y* as it was enjoyed when the sale was made. Similarly *A* is entitled, by an implied reservation, to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Z* as it was enjoyed when the sale was made. See Illustrations (*c*), (*d*), (*e*), (*f*), and (*h*) of sec. 13, Act V of 1882.

Severance by compulsory sales.

Heritages severed by a compulsory sale in execution of a decree are also governed by the same principles. Hurree v. Hem, 22 W. R., 522. The same rule applies to partition by mutual conveyances,

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of the doctrine laid down in *Wheeldon* v. *Burrows*. In England, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it *expressly* in the grant. (*Bell* v. *Love*, in H. L., 9 App. Cas., 286). The four exceptions are: (1) easements of necessity, (2) certain reciprocal easements, (3) *quasi*-easements in cases of simultaneous transfers to each of two persons by the same owner, and (4) formed roads which, circumstances positively prove, were intended to be reserved.*a (See Gale, 6th Ed., pp. 131-133; *Delhi and London Bank* v. *Hem Lall*, I. L. R., 14 Calc., 839, 853).

(English law as to reservations).

It may be here observed that there may be (1) *quasi*-easements which are first used during the unity of ownership, as well as (2) *quasi*-easements which were true easements before the unity of ownership, but which *became quasi*-easements by reason of the dominant and servient heritages becoming the property of the same person. For the purpose of implying a grant, it does not matter to which class the *quasi*-easement belongs. Upon a severance taking place, *quasi*-easements, of either class, if continuous and apparent, are converted into new* easements, by implication. A grant (or sometimes even a reservation) is presumed, if they are in their nature continuous and apparent, and necessary for enjoying the severed portions as they were enjoyed before the severance.*a Where the alleged *quasi*-easement does not fulfil these conditions, or is not absolutely necessary for the

Two classes of *quasi*-easements.

Both equally pass by *implication*.

Where *express* words are necessary.

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whether under the direction of a Court of Law or otherwise, but it is difficult to say whether the rule would apply to the case of a partition by the act of a Court of Law. (Bolye Chandra v. Lalmoni, I. L. R., 14 Calc., 797, 801). See sec. 109 of the Bengal Partition Act, Calc. S. D. A. Rep. for 1860, p. 554; Modhoosoodun v. Bissonath, 15 B. L. R., O. C., 361, 367. In Purshotam v. Durgoji, I. L. R., 14 Bom., 453, it does not appear that the partition there was effected by mutual conveyances. Nevertheless the rule that "upon a severance of tenements, easements used as of necessity, or in their nature continuous (and apparent) will pass by implication of law" was adopted and acted upon. The Easements Act also recognises the rule in *all* cases of partition.

Severance by partition.

*a See note 4, *supra*, and Goddard, 4th Ed., p. 179.

* See Gale, p. 89; Goddard, p. 357. Easements "of necessity" existing as *quasi*-easements during the unity of ownership, whether they are apparent and continuous or not, revive upon a severance if the necessity continues. A "necessary easement," in secs. 47 and 51 of Act V of 1882, means an "easement of necessity." (See Stokes' Anglo-Indian Codes, Vol. I, p. 922).

** Such implication or presumption does not arise if a different intention is expressed or necessarily implied. While easements of necessity must in all cases pass (to the grantee or grantor) *quasi*-easements, even if apparent and continuous, *may* be excluded either by express words in the conveyance or by necessary implication. (See sec. 13, Act V of 1882).

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enjoyment of the severed property, it does not pass to the grantee, or is not reserved to the grantor by any implication of law. Questions of implied grants or reservations can only arise when the deed of transfer contains no words, general or special, passing or reserving such *quasi*-easements.[55] If the general or special words in a deed have any effect, they must operate as an express grant, and questions of implication are excluded.

General words.

Certain general words (such as the words "together with all easements and advantages therewith used and enjoyed"), or words particularly describing the right, are necessary to pass or reserve a *quasi*-easement, which does not fulfil the conditions mentioned above. The insertion of such words in the conveyance is (since 1st January 1882) rendered unnecessary in England, by the operation of sec. 6 of the Conveyancing and Law of Property Act, 1881.[6]

Effect of the *general* words "appurtenances" and "easements enjoyed therewith."

In the absence of such a positive law, the general word "appurtenances," ordinarily inserted in deeds of conveyance, though sufficient to pass an existing easement over the property of a third person, is generally insufficient to pass a *quasi*-easement.[7] Mr. Goddard gives the result of the

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[55] Goddard, 4th Ed., p. 179. Easements, whether continuous or discontinuous, and even rights or modes of user, which though not strictly easements, are nearly akin to them, and which have been visibly enjoyed by the property sold over the property retained will pass under the customary general words. (Dart's Vendors and Purchasers, 6th Ed., p. 611).

[6] Goddard, 3rd Ed., p. 129; Williams' Real Property, pp. 381, 579; Goodeve, pp. 370, 371.

The general words easements, privileges, rights, and advantages whatsoever appertaining or reputed to appertain to the land granted or at the time of the grant enjoyed with the land, &c., are now implied in *every* conveyance (executed since 1882) in England.

If it is intended to except from a grant any right or *quasi*-right commonly enjoyed by the property prior to the grant, it will in future be necessary expressly to exclude the operation of sec. 6 of the English Act.

[7] Because *quasi*-easements are not strictly rights appurtenant. But it would seem that the words "appurtenant" or "belonging" would, under certain circumstances, have a wider meaning. (Chunder Coomar v. Koylas Chunder, I. L. R., 7 Calc., 665). Blackburn, J., in Kay v. Oxley, L. R., 10 Q. B., 360, says: acts of ownership and user, by the owner of two contiguous plots of land, of a road across one of the plots for the enjoyment and exclusive convenience of himself as occupier of the other plot, may, notwithstanding the unity of possession, amount to an enjoyment of the road as "appurtenant" to this other plot. See Wutzler v. Sharpe, I. L. R., 15 All., 270—288.

Sec. 8, Act IV, 1882. Sec. 19, Act V, 1882.

Under sec. 8 of the Indian Transfer of Property Act, and sec. 19 of the Easements Act (both of which Acts came into force on the 1st of July 1882), the simple transfer of lands or houses passes to the transferee the existing easements annexed thereto. This too was the law of England, even before the passing of the statute of 1881. It is

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English authorities on this subject in the following words: "If a man has two adjoining properties, and exercises a *quasi*-easement over the one for the beneficial enjoyment of the other, and sells the *quasi*-dominant tenement—if he sells it merely 'with the appurtenances,' no easement (unless in some exceptional cases) is gained by the purchaser; if the *quasi*-easement existed as an easement before unity of ownership of the two properties, and the *quasi*-dominant tenement is sold 'with the easements used and enjoyed therewith,' the purchaser will become entitled to the easement; if the *quasi*-easement did not exist as an easement before unity of ownership, and the *quasi*-dominant tenement is sold 'with the easements used and enjoyed therewith,' the purchaser will get the easement if it is of a continuous character, as, for instance, a watercourse; but ordinarily he will not get it if it is only used from time to time, as a right of way. There are cases, however, in which the purchaser may get the easement, even though it is not continuous, for the general words in the deed of conveyance may be of such a character that the right will pass; but whether the right is gained must depend in each case upon the surrounding circumstances and the words used in the deed."[1] It may be further observed that even in the case of a discontinuous *quasi*-easement, such as a way which has been *first* used during the unity of ownership, and which never existed as an easement proper, the words "rights used and enjoyed therewith," or "therewith held or enjoyed," are large enough to

As regards the first class.

As regards the second class.

As regards *some* of the second class.

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apprehended, that even in the Panjab and in British Burmah, to which neither of the two Acts has yet been extended, the same rule as to the passing of existing easements to the transferee will be observed. As to implied grants of existing *quasi*-easements, as new easements, the same rules prevail in England as well as in the whole of British India. As to the effect of (*express*) general words in a conveyance, see Rattanji v. Edalji, 8 Bom., 181, and Bottlewalla's case, 8 Bom., 185. Sec. 8, Act IV of 1882, and sec. 19, Act V of 1882, transfer to the transferee all existing easements (properly so called) over the property of *third* persons, unless a contrary intention is expressed or necessarily implied. Sec. 13, Act V of 1882, transfers all easements of necessity over the grantor's property in all cases. Sec. 13 also transfers *quasi*-easements over the grantor's property provided they are apparent and continuous and necessary for enjoying the property granted in the state in which it was at the time of the grant, and provided a contrary intention is not expressed or necessarily implied. Sec. 6 of the English Statute of 1881 (44 and 45 Vict., Chap. 41) transfers, unless a contrary intention appears, existing easements proper, as well as *quasi*-easements, whether apparent and continuous, or not. As to the operation of these sections of the English and Indian Acts, see I. L. R., 15 All., 270, pp. 285 *et seq.*

Operation of the Statute of 1881 compared with that of the Indian Acts.

[1] Goddard, 2nd Ed., p. 99; 3rd Ed., p. 138; 4th Ed., p. 140. Circumstances shewing what the parties must have intended and contemplated may affect the question. (Meyers v. Catterson, 43 Ch. D., 470; Thomas v. Owen, 20 Q. B. D., 225).

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carry or convey it, and to erect it into an easement proper in favor of the grantee; *provided* it has, in fact, been used for the convenience of the *tenement granted*, and not merely for the personal convenience of the *grantor* in the use of the property as a whole while in his hands.[9] In England, a formed road of a defined and permanent character (and not a mere track) is often treated as a *continuous* and *apparent* easement. (See *Thomas* v. *Owen*, 20 Q. B. D., 225, and Goddard, 4th Ed., pp. 141, 173).[9a]

Formed road.

Boundary lane.

Estoppel.

It is, at least, doubtful whether a description in the conveyance that the property is bounded on one side by a passage or lane over the vendor's other lands, would of itself carry a right of way over the passage.[10] Such description, together with the conduct of the parties, may however *estop* the vendor from denying the right.[1]

Extent of such easements.

A person who acquires an easement by the "disposition of the owner of two tenements" only acquires it to the same *extent* as if he had acquired it by *prescription*.[2]

III. Local custom.

III. Easements (whether conveniences or profits) may also be acquired in virtue of a local custom.[3] According to English law, profits (even if not unreasonable) cannot be acquired by custom by a fluctuating body like the inhabitants of a village.[4]

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[9] Chunder v. Koylas, I. L. R., 7 Calc., 665; I. L. R., 8 Calc., 677.

[9a] But it has not yet been decided in any case in England, that a way without any express or general words in a conveyance (and apart from any structural peculiarities of a building indicating that for the use of the building a way must have been intended to pass) would pass on a severance, as an apparent and continuous easement. (Wutzler v. Sharpe, I. L. R., 15 All., 270, at p. 298). Where such general words of grant as "together with all ways now used or enjoyed therewith" are used in the conveyance, the distinction between a continuous and a discontinuous easement does not apply, and a right to use any made and visible road over other land of the grantor which at the date of the grant was in fact used for access to the land conveyed, passes under such words. (*Ibid.*, pp. 297, 298).

[10] Chunder v. Koylas, I. L. R., 7 Calc., p. 670. [1] Goddard, 3rd Ed., 125.

[2] Leach v. Schweder, L. R., 9 Ch. D., 472; Delhi and London Bank v. Hem Lall Dutt, I. L. R., 14 Calc., 839, 853.

Easements acquired in virtue of a custom. Rights in gross acquired by custom.

[3] See p. 357, *supra*; sec. 18, Act V of 1882. This Act expressly provides that "profits," taken for the beneficial enjoyment of, and *appurtenant* to, particular tenements may be acquired in virtue of a custom. Claims by individuals to *such* profits are not open to the objection to which claims by custom, by a fluctuating body of persons (incapable of receiving a grant) are liable. (Per James, L. J., in De La Warr v. Miles, 17 Ch. Div., 535, at p. 586).

[4] See pp. 357, 358, *supra*.

As to the acquisition of profits in gross by custom, and of easements and profits appurtenant in virtue of a custom, see pp. 357, 358, *supra*. Even before Act V of 1882, rights of grazing cattle, against the Government, not being necessarily unreasonable, might be claimed by the inhabitants of a particular village by custom in British India. (Secretary of State v. Mathura, I. L. R., 14 Bom., 213).

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Requisites of a valid customary easement.

These customary easements (whether mere conveniences or profits *à prendre*) must be possessed of the same characteristics as those which are essential for the validity of customs generally. Thus they must be *reasonable* and *certain*.[a] There must also be satisfactory proof of usage so *long* and *invariably* acted on in practice, as to show that it has by common consent been submitted to as the established rule of the district or part of the country.[a] A *grant* of an easement to an *individual* need not be reasonable, but rights, claimed by an indefinite number of persons under a *custom*, must be reasonable. Customary rights, like public rights, are rights in gross. But customary *easements* must be appurtenant (and beneficial) to some land or heritage in the locality to which the custom applies. (See p. 357, *supra*).

Customary easements and rights in gross.

Easements created by local custom must not only be claimed in respect of some land in the locality, but must also be rights to do something (not for the personal benefit of the owner, but) for the beneficial *enjoyment* of *such land*.

Proof of customary and prescriptive easements.

The evidence required to prove a customary easement is to a large extent similar to the evidence required to prove a prescriptive easement.[aa] In both cases there must be evidence of user. But evidence of enjoyment for the benefit of *one* tenement, though it might prove a prescriptive easement in favor of that tenement, could not of itself establish a customary easement in favor of that and *all other* tenements in the locality. And, conversely evidence showing enjoyment of the right by the owners or occupiers, of *all* the tenements alike, *i.e.*, evidence of the customary right, is not evidence of a prescriptive right in the owner or occupier of any *particular one* of those tenements. (*Blewett* v. *Tregonning*, 3 A. and E., 554, at p. 588; Michell, p. 83).[ab]

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[a] Goddard, 4th Ed., p. 251. Customs must be immemorial, continuous, peaceable, reasonable (or rather not unreasonable), certain (*i.e.*, definite), compulsory (*i.e.*, not optional), and consistent. (Rawson's Law-Lexicon). No custom can prevail against an express Act of the Legislature. (See Stephen's Commentaries, Vol. I, pp. 64—68). A valid custom must be certain, invariable, and reasonable. It must also be presumably known to the party to be affected by it. (Price v. Brown, I. L. R., 14 Mad., 420).

[aa] Shidojirav v. Naik, 10 Bom., 228, 234. See also 26 W. R., P. C., p. 70.

[ab] Goddard, 4th Ed., p. 251.

[ab] A claim of all the inhabitants of a village to use a green for the purpose of recreation is not established by an user or enjoyment by the villagers, as well as by the public in general. If there is no distinction between the user of the villagers, and that of all the rest of Her Majesty's subjects, the user of the villagers is user by them not as villagers, but as Her Majesty's subjects. Such user does not afford any evidence in support of the claim sought to be established. (Hammerton v. Honey, as explained by Cotton, L. J., in 17 Ch. D., 535, at p. 598). If a person takes grass or wood from another's land to be used on the premises of the former, and also for the purpose of selling it—if the enjoyment is

Claim and proof of village and public rights.

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Positive prescription overrides custom.

No incident of any valid customary easement is affected by rules relating to the incidents of ordinary easements (Sec. 20, Act V of 1882). But all customs inconsistent with the rules relating to positive prescription (*e.g.*, with sec. 26, Act XV of 1877, or sec. 15, Act V of 1882) are overridden by such rules. One cannot, under a plea of custom, cut off the projecting eaves of his neighbour's house when the latter has acquired under such positive rules a prescriptive right to retain the same. (See *Mohonlall* v. *Ambaidal*, I. L. R., 3 Bom., 174, and p. 208, *supra*).

IV. Estoppel.

IV. An easement is sometimes acquired by estoppel—as, for instance, if *A*, without title, professes to impose an easement in favour of *B*, *A* will be estopped from denying the right to such easement, if he subsequently acquires title to the servient heritage.[7]

V & VI. Prescription, and presumption of lawful origin.

V & VI. Easements are very often acquired by long and continued enjoyment,[8] that is, either by *prescription*, or

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Claim and proof of rights appurtenant and in gross.

partly for the use of the premises, and partly for sale, a right appurtenant to the premises cannot be established, if there is no distinction at all between the user appurtenant, and the user in gross. (See 17 Ch. Div., 535, at pp. 595 and 598). But where an easement appurtenant to some land, in a village, is claimed by one of the villagers by custom, and he fails to prove a valid custom, he may succeed in proving a prescriptive right, provided he proves that he enjoyed the privilege as an occupier of his land, and that the right was attached to such land. (Blewett v. Tregonning, as explained in 17 Ch. Div., 535, at p. 597). If the right claimed is one which could have a legal origin by prescription, it is immaterial whether the plaintiff rested his claim on an invalid custom or on prescription. (See De La Warr v. Miles, 17 Ch. D., 535). In Virisa v. Tatayya, I. L. R., 8 Mad., 467, a claim of an exclusive right of fishing by one villager, though based upon prescription, was considered to be sustainable if the right could be established by custom. In Zemindar v. Zemindar, I. L. R., 5 Mad., 253, a claim of an easement on the strength of a custom was decreed on the ground that the plaintiff had made out a title by prescription.

Claim and proof of customary and prescriptive rights.

[7] Goddard, 3rd Ed., p. 125; Act I of 1872, sec. 115. See p. 400, *supra*. As regards the title to easements by the servient owner's acquiescence (and encouragement), see Gale, 5th Ed., pp. 78—84. The doctrine of acquiescence is based on the rule of equitable estoppel—see p. 64, *supra*.

Discontinuous easements in France, and negative in Scotland.

[8] The Code Napoleon, by Art. 690, allows servitudes, if continuous and apparent, to be acquired (1) by title or deed, or (2) by possession for thirty years. By Art. 691, the Code enacts that continuous non-apparent servitudes, and discontinuous servitudes, whether apparent or not, can only, in future, be established by titles or deeds. No discontinuous, or non-apparent, servitude can be established, under the Code, even by immemorial possession or enjoyment. In this respect, the English law and the Indian law make no distinction between easements continuous and discontinuous, apparent and non-apparent. Some particular easements, however, are incapable of being acquired by prescription—see sec. 17, Act V of 1882. In Scotland, positive servitudes alone are capable of being acquired by long enjoyment. **Angus** v. **Dalton**, 6 App. Cas., 740, 831.

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by the *presumption* which refers such enjoyment to *some possible lawful origin* consistent with the circumstances of the case.[9]

Prescription at Common Law.

According to the English Common Law, *long* continual enjoyment of an incorporeal right, when it has been enjoyed "*nec vi*" (peaceably, not contentiously or by force), "*nec clam*" (openly, not by stealth), "*nec precario*" (as of right, not at the will or pleasure of others), establishes the right prescriptively.[10] As to "long" Lord Coke says: "It is the time given by law, which in England, is the time whereof there is no memory of man to the contrary." But though living memory might not be to the contrary, a claim by prescription was defeated, if written evidence showed that the enjoyment had a beginning. Shortly after the enactment of the Statute of Westminster in 1275, the time of legal memory was fixed (by judiciary law) to be the same as the limitation of real actions by that Statute, *viz.*, the time of Richard I, A. D. 1189. This, when first introduced, gave a prescription of about eighty-six years, but being a fixed date, it became longer and longer,[1] and now it is more than 700 years. In the year 1623, the Statute 21, James I, c. 16, was passed, by which entry on lands was prohibited, except within twenty years after the accruer of the right, and, as a necessary corollary, an adverse enjoyment of lands for twenty years became a bar to any action of ejectment.[2] A little more than a century after this, the Judges introduced a new method of claiming incorporeal rights by means of a *fictitious* or imaginary modern grant, which, after twenty years' undisputed enjoyment, was presumed to have been made and subsequently lost. The fiction of a lost modern grant, or the presumption of some lawful origin,[3] based on the fact of twenty years'

The fiction of a lost modern grant.

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[9] As to the presumption of a legal or lawful origin, see Rajroop Koer *v.* Abdool Hossein, 7 C. L. R., 529, 533, P. C.; (S. C.), I. L. R., 6 Calc., 394, and note (3), p. 8, *supra*. See also Angus *v.* Dalton, 6 App. Cas., 740, 780, where Bowen, J., points out that, since the fusion of law and equity in England, it is better to speak of "the presumption of a legal origin" as "the presumption of a lawful origin." ("Lawful" includes both "legal" and "equitable").

[10] See 6 App. Cas., 740, 796.

[1] Angus *v.* Dalton, 6 App. Cas., 740, at pp. 810, 811; Lord Blackburn's judgment.

[2] 6 App. Cas., 740, at p. 781.

[3] It is presumed that the enjoyment originated lawfully, that is according to the Common Law of England, by a grant, provided the right claimed could possibly be the subject of a valid grant. There can be no presumption of a lost grant with respect to matters which cannot be the subject of prescription. A claim by a member of the public as such to fish or angle in private waters is impossible in

Presumption of lawful origin.

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Presumption of lawful origin.

enjoyment, supplied the place of prescription, when length of possession was less than immemorial.[4] This modern doctrine which is ancillary[5] to the doctrine of prescription at Common Law, and which is scarcely more than 125 years old, gives to twenty years' enjoyment the effect of prescription, though it is proved that the enjoyment began within living memory.[6] Before the introduction of this doctrine, the Judges had adopted as a *quasi*-statutory standard, the period of twenty years as the time after which the immemorial enjoyment of an easement might be presumed.

Where legal origin, possible.

English law. Such a right according to North, J., cannot be the subject of a valid dedication for the use of the public. As the public cannot possibly have a legal right to fish in non-tidal waters, their enjoyment of such a right for any length of time cannot raise the presumption of a lawful origin. (See Smith *v.* Andrews, 1891, 2 Ch., 678, at p. 699). "You cannot claim by prescription anything which could not have a lawful beginning." (Per Lord Cairns, in Goodman *v.* Mayor of Saltash, 7 App. Cas., 648). "Where there has been long continued possession in assertion of a right, it is a well settled principle of English law, that the right should be presumed to have had a legal origin, if such a legal origin was possible." (Per Lord Herschell in Phillips *v.* Halliday [1891], A. C., 228, at p. 231).

Even if there is evidence to show that the first enjoyment of the right claimed had an illegal origin, subsequent enjoyment as of right may raise the presumption of a lawful origin at a later date. Phillips *v.* Halliday, 1891, A. C., 228.

Presumption of a lost faculty.

In the case of a pew, a lost "faculty," or license issued by the Ordinary, may be presumed. *Ibid.* But the Court will not presume a non-existent Act of Parliament as an origin for an alleged right. (Chelton *v.* London Corporation, 7 Ch. D., 735).

[4] 6 App. Cas., 740, 796.

[5] *Ibid.*, p. 816.

Presumption, of *fact* or of law?

[6] 6 App. Cas., 740, 810, 812; see also Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, 22. This presumption is a presumption of law, which may be rebutted by such circumstances as the infancy or insanity of the servient owner, or the occupier of the *locus in quo* being only a lessee for a term or life. See Sir Barnes Peacock's judgment, 3 B. L. R., O. C., 18, 47; and Lord Justice Cotton's judgment in Angus *v.* Dalton, 4 Q. B. D., 162. It is not a *præsumptio juris et de jure*—it is conclusive only when the evidence of enjoyment is uncontradicted and unexplained, that is, when it does not appear that the servient owner could not have granted the easement. 6 App. Cas., 740, 751 (the opinion of Pollock, B.) The presumption must be acted upon, even if it appears that no grant was in fact made by the servient owner. 6 App. Cas., 740, 800, 814. The learned editor of the 6th Edition of Gale on Easements, at p. 174, considers this to be now the settled law in England. Mr. Justice Markby was of opinion that this presumption was a presumption of fact. (Bagram *v.* Khetternath, 3 B. L. R., O. C., 18. See also Bhuban *v.* Elliot, 6 B. L. R., 85). Bowen, J., also is of the same opinion. 6 App. Cas., at p. 782. Mr. Goddard, in the 4th Edition of his work, is of opinion that the weight of authority is decidedly in favor of the principle that the presumption of a lost grant is a rebuttable presumption of fact, and that such presumption may be defeated by positive proof that as a fact no grant was ever made. (See pp. 155, 156). As to what rebuts the presumption, see p. 408, note 8, *infra*.

Difference of opinion.

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But such presumption was rebutted if the commencement of the enjoyment, or the extinguishment of the easement by unity of ownership or otherwise, at some period subsequent to the reign of Richard I, could be proved by the party contesting the right.[7] And it was this difficulty of establishing a title by prescription at Common Law which suggested the invention of the expedient of claiming easements by the fiction of a lost or non-existing grant.[8] The theory of an implied non-existing grant, as distinguished from a legal presumption of some lawful origin, is untenable and practically misleading in British India, and even in England since the fusion of law and equity.[9]

Statutory prescription in England.

In 1832, the 2 and 3 Will. IV, c. 71, an Act for shortening the time of prescription in certain cases, was passed. This Act, commonly called Lord Tenterden's Act,[10] or the Prescription Act, removed the difficulty in the way of establishing prescriptive titles, by providing that an easement enjoyed as of right for twenty years, or a profit *à prendre*, similarly enjoyed for thirty years, shall no longer be liable to be defeated or destroyed by showing only that it was first enjoyed within time of legal memory.[1] The Act has also rendered it unnecessary to force the consciences of juries to find that there had been a lost grant, when the presumption was known to be a mere fiction.[2] It made that a direct bar, which was before only a bar by the intervention of a jury and the use of an artificial fiction of law. But it did not abolish the doctrines of presumption which had been introduced before its enactment. If it had abolished those doctrines, old rights, even from time immemorial, would have been put an end to by unity of occupation for the space of a year.[3]

Doctrine of presumption not abolished.

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[7] See Tudor's L. C. on Real Property, 180; Goddard, 116; Subramaniya *v.* Ramchandra, I. L. R., 1 Mad., 335, at p. 337. A title by immemorial prescription is excluded by a knowledge of the commencement of the user in modern times. (Wheaton *v.* Maple, 1893, 3 Ch., 48, at pp. 63, 67).

[8] Goddard, 117.

[9] Per Lindley, J., in Angus *v.* Dalton, 6 App. Cas., 740, at p. 765. Lopez, J., is also of the same opinion. See note 9, *supra*.

[10] The 9 Geo. IV, c. 14, relating to written acknowledgments, is also called Lord Tenterden's Act.

[1] See 6 App. Cas., 740, at p. 800. See also the judgment of Martin, B., in Mounsey *v.* Ismay, 3 H. and C., 486; Goddard, 103.

[2] See 3 Q. B. D., 105; and 6 App. Cas., 740, at p. 799. This mode of claiming an easement under the fiction of a lost grant is therefore becoming obsolete. (See Pollock on Torts, 2nd Ed., pp. 357, 358).

[3] See Angus *v.* Dalton, 6 App. Cas., at p. 814; Goddard, 103, 104. Unity. The expression "unity of ownership" or "unity of possession or occupation," which is often employed to denote that species of union

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Difference between a twenty and a forty years' user.

The conditions which were generally necessary before the Statute are still necessary to the acquisition of prescriptive rights by twenty years' user under the Statute. But it may be observed that, under the Statute, there is an important difference between a forty years' and a twenty years' user of an easement, and between a sixty years' and a thirty years' enjoyment of a profit *à prendre*. Forty years' user of an easement (other than light) has the same effect as twenty years' user has as to light; it makes the right absolute and indefeasible, unless it is shown to have been enjoyed by consent or agreement in writing. But twenty years' user of an easement (other than light) may be defeated by any objection[4] to which a claim by prescription

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which will extinguish an easement, is inaccurate. *Unity of ownership in fee* of both the tenements extinguishes easements. Goddard, 2nd Ed., pp. 365-367.

The rules for computing the periods of time prescribed by Lord Tenterden's Act provide that the claimant is not entitled to the benefit of the Act if his enjoyment (in fact) of the right has been obstructed for a year within the twenty years or other period prescribed by the Act, or if the enjoyment cannot be brought down to the commencement of the suit. Interruptions in the enjoyment are

Three kinds of interruptions.

of three kinds: (*a*) interruptions in the enjoyment as of right; (*b*) interruptions in the enjoyment as an easement or as a servitude; (*c*) interruptions in the enjoyment in fact. (Goddard, 104 and 154, 3rd Ed., pp. 233-235). Mere unity of occupation or possession occurring at any time during the 20 years (if such 20 years be a continuous period) is certainly sufficient to prevent a claim from being established under the Act. The enjoyment of the right as of right and as an easement for 20 years is disproved by the fact of the dominant and the servient tenements being (for any part of that period) in the occupation of one and the same person. But in a claim by prescription at the Common Law an instance of unity of possession, without also unity of ownership, would not prevent its establishment. (Modhusudan *v.* Bissonath, 15 B. L. R., 361; Gale, 5th Ed., p. 153). The right is supposed to have been acquired, by prescription at Common Law, before the unity of possession. Unity of

Effect of unity.

ownership in fee extinguishes a right which has been already acquired. Unity of possession suspends the right if it has been so acquired. The point whether unity of possession merely suspends the acquisition under the statute, or entirely destroys the effect of the previous user, cannot be regarded as settled. (Gale, 6th Ed., p. 208). Such unity does not (perhaps) entirely destroy the effect of the previous user. (Hollins *v.* Verney, 13 Q. B. D., 304, at p. 313. See notes, pp. 420, 421, *infra*.

Common law objections to acquisition of prescriptive rights.

[4] As, for instance, a previous license (written or parol) by the servient owner extending over the whole period; or the absence and ignorance of the servient owner and his agents during the whole period. Gale, 167 (note). Permission or license given from time to time during the continuance of the user also makes the enjoyment precarious and, therefore, ineffectual. Goddard, 153. There can be no prescription if the servient owner has been ignorant of the user, or incapable of resisting the user, or of granting the right claimed. Goddard, 141, 144, 146. As regards ignorance, it has been laid down that knowledge may be presumed from the circumstances of the case. Goddard, 147.

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at Common Law was open, except that of showing a commencement within time of legal memory.[5] (The same remark applies to sixty years' enjoyment of a profit *à prendre*, as distinguished from a thirty years' enjoyment of the same). Sections 27 and 28 of Act IX of 1871, secs. 26 and 27 of Act XV of 1877, and secs. 15 and 16 of Act V of 1882 have, for their prototype, the English statutory law of prescription relating to the acquisition of a right to light by twenty years' user, and of other easements by forty years' user. Any right acquired under these sections by twenty years' user, in British India, is absolute and indefeasible.[6] It is matter *juris positivi*, and does not require the fiction or presumption of a grant to support it.

The English prototype of the Indian Law of positive Prescription.

In England, there are thus four ways of claiming an easement by long enjoyment, *viz.* :—

Four ways of claiming easements by long enjoyment in England.

(*a*) By immemorial user from the commencement of the reign of Richard I. Such user may be presumed from proof of an enjoyment as far back as living witnesses could speak, or even from twenty years' enjoyment, unless rebutted by evidence, showing that the user actually commenced within time of legal memory. Proof of unity (*a*).

Ignorance of the servient owner.

Angus *v.* Dalton, 6 App. Cas., 801. The servient owner must have had some probable means of knowing what was done against him before a grant can be presumed against him. "A grant will not be presumed against an ignorant man, not in possession at the time of that which is to give him knowledge of the fact, and from whence knowledge would be presumed." Daniel *v.* North, 11 East, 370, 372. It cannot be denied that in a proper case, a presumption of a grant may be made even against the reversioner; "but when you have a man who is not in possession, and who cannot be supposed to see what is going on, and is not shewn to be affected by any knowledge of the acts likely to cause the injury to his property, I do not think you ought to make the presumption." (Per Kekewich, J., in Wheaton *v.* Maple, 1893, 3 Ch., 48, at p. 57). See notes, pp. 414, 418, *infra*. As to licenses, see note 9, p. 408, *infra*.

[5] 6 App. Cas., 800; Gale, 167 (note).

[6] See *Ind. Gaz.*, 13th Nov. 1880, Part V, p. 477; Goddard, 125, 126. It has been held that section 26, Act XV of 1877, "enables any person to acquire a right of way by a twenty years' user without reference to any grant, express or implied, from the servient owner." (Delhi and London Bank *v.* Hem Lall, I. L. R., 14 Calc., 839, at p. 855).

"For the purpose of acquiring a right of way or other easement under sec. 26 of the Indian Limitation Act, it is not necessary that the enjoyment of the easement should be known to the servient owner. In this respect there is a difference between the acquisition of such rights under that Act and their acquisition under the English Prescription Act." (Arzan *v.* Rakhal, I. L. R., 10 Calc., 214, 218). The latter portion of this dictum refers to the acquisition of easements by 20 years' user under the English Prescription Act. The acquisition of easements by forty years' user under the English statute does *not* depend on the knowledge of the servient owner. Gale, 5th Ed., p. 167; p. 288, note (*n*). See also p. 408, *infra*.

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of possession without unity of ownership in fee does not destroy the right.

(b) By a modern lost grant, presumed to have been made from twenty years' user, where it is proved that the user commenced about the time when the grant is presumed to have been made.* Instead of presuming a lost grant, a right may be presumed without stating how it originated, except where a lost grant is pleaded and put in issue.*

The first and second modes are available, even when user has been interrupted for more than a year before suit.

(c) By forty years' enjoyment next before the commencement of the suit.

In the computation of this period, the time during which the owner of the servient tenement was an infant, or otherwise incapable of resisting the enjoyment is not excluded, as it is in the case of twenty years' enjoyment, under the Act. A *parol* license given by the servient owner before the commencement of the user, and extending over the whole period, is not sufficient to defeat the right. Nor is the right defeasible by reason of the absence and ignorance of the owner during such period. According to

* Goddard, 104; Angus *v.* Dalton, 6 App. Cas., at p. 800.

* See the judgment of Sir Barnes Peacock in Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, 46. As regards the easement of support (if not other easements) there is authority for saying that the right springs directly from the long enjoyment, without the interposition of a grant inferred or imputed. Gale, 6th Ed., p. 173. The doctrine of a presumed grant is nevertheless applicable to the acquisition of such a right. *Ibid.*, 174. Ignorance of, or incapacity to resist, user rebuts the presumption of a grant. (Goddard, 105). In cases of right presumed from modern user, it is necessary to see whether the servient owner was capable of acquiescing in the easement. If he is an infant, or a mere reversioner without possession, he is not capable of granting the easement or acquiescing in its acquisition. The presumption cannot be displaced by merely showing that no grant was in fact made, —it is so far conclusive. But legal incapacity to grant the easement, extending over the whole time in the course of which the right, if granted at all, must have been granted, will rebut the presumption, and negative the claim so far as it rests on the fiction of a lost grant. In (*a*), (*b*) and (*d*), physical incapacity of being obstructed as regards the easement, and uncertainty and secrecy of enjoyment, putting it out of the category of known easements, will also negative the claim. Gale, 6th Ed., p. 172. In Elliot *v.* Bhuvan, 19 W. R., 194, the Privy Council held, that uninterrupted user of at least twenty years with the acquiescence of the owner of the servient tenement, was necessary to establish such a right according to the English law which was applicable to Calcutta before the positive Enactments of the Legislature came into force. But as to acquiescence, see the observations of Lord Blackburn in Angus *v.* Dalton, 6 App. Cas., 740, at p. 818, and p. 29, *supra*.

Capacity to acquiesce necessary in (*a*), (*b*) and (*d*).

Licenses.

* See Gale, 167 (note) and 171 (note). A written license given before the commencement of the enjoyment, prevents the acquisition

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Chitty, J., forty years' enjoyment of an easement by even one lessee against another lessee of the same landlord gives an absolute right against all the world except the reversioner, who may resist the right within three years of the determination of the lease. (See *Harris* v. *DePinna*, 33 Ch. D., 238, at p. 253). But it has recently been held by the Court of Appeal, that if a right of easement cannot be established by prescription against the reversioner, it cannot be established even against the lessee. (*Wheaton* v. *Maple*, 1893, 3 Ch., 48, and p. 372, *supra*).

Four ways of claiming easements in England.

Unity of possession, even without unity of ownership, during any part of the period, prevents, or, at least, suspends the acquisition of the right.

(*d*) By twenty years' enjoyment next before the commencement of the suit. (*d*).

In computing this period, the time during which the servient owner was personally incapable of resisting the enjoyment must be excluded. The right is defeasible in any way by which a claim by immemorial user is liable to be defeated, except the proof of a commencement within legal memory.[10]

No easement can be acquired under the third and fourth modes unless the servient or dominant owner brings a suit in which the right is disputed, and the enjoyment of the right is shown to have continued up to the commencement of the suit.[11]

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of the right in any case. A parol license, given before the commencement of the enjoyment, does not prevent the acquisition of an easement by forty years' user. A license, written or parol, given at any time within the prescribed period, makes the enjoyment precarious, and prevents the acquisition of the right by forty years' enjoyment, and *à fortiori*, by twenty years' enjoyment. At the Common Law, license, written or parol, given before or during the enjoyment, prevents the acquisition of the right. In British India no distinction is made between written and parol license. As to previous license, or agreement, see expl. 1, sec. 15, Act V, 1882. License.

[10] See note (4), p. 406, *supra*.

[11] Goddard, 128; Innes' Digest, 31; Payne v. Sheldon, 1 Moo. and Rob., 382. Interruption submitted to for less than one year not being an interruption within the meaning of the Prescription Act, the dominant owner may prove an uninterrupted constructive enjoyment up to the commencement of the suit, notwithstanding such interruption immediately before the suit. (Flight v. Thomas, 8 Cl. and Fin., 231). An interruption for less than a year is not fatal, whether it occurs at the commencement, or end, or at any part of the statutory period. A mere non-user for more than a year, at the beginning, or the end, or in the middle of the statutory period, if accounted for, is also not fatal. If the non-user occurs at the end of the period, there can be no subsequent user to explain it, and the *inference* of constructive enjoyment for the full period is more difficult to draw

What interruption in *fact*, is not fatal under the statute.

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It is frequently advisable to plead together in the same case all these four modes of claiming an easement, so that the evidence produced may support the claim in one or other of the several modes.[1]

The second recognized in British India.

As the English Prescription Act was never extended to British India, and as immemorial prescription, in the *peculiar* English sense of that term, could not be availed of in a country which had come under British rule many centuries after the reign of Richard I, the only one of these four modes of acquiring easements by long enjoyment which could be, or was practically, recognized in British India was the second.[2] But the *quasi*-Parliamentary standard of twenty years' enjoyment could be adopted in the Presidency-towns only. In the mofussil, different standards, as stated[3] in Lecture III, were adopted. But whatever the periods of enjoyment required might be, this mode of acquisition was based on the presumption which refers a long enjoyment to some lawful origin or title.[4]

Statutory prescription in British India. Acts IX of 1871, XV of 1877.

From the first day of July 1871, a rule of statutory prescription for the acquisition of easements has been introduced in British India by Act IX of that year, and from the first day of October 1877, the same rule has been extended by Act XV of that year to the acquisition of profits *à prendre*. From the first day of July 1882, the law on the

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than in other cases. (Hollins *v.* Verney, 13 Q. B. D., 304, at p. 314). See "continuity of enjoyment," pp. 429 *et seq.*, *infra*.

May "light" be now claimed at common law?

[1] See Bullen and Leake's Precedents of Pleading, cited in Goddard on Easements, 2nd Ed., p. 104 (note); 3rd Ed., p. 148 (note). Notwithstanding the decision of the House of Lords (in Tapling *v.* Jones) that prescriptive rights to light now depend upon positive enactment, James, L. J., in Aynsley *v.* Glover (L. R., 10 Ch. Ap., 283), says: "The statute 2 and 3 Will. IV., c. 71, has not, as I apprehend, taken away any of the modes of claiming easements which existed before the statute." As the statute requires the 20 years or 40 years (as the case may be) to be the 20 years or 40 years next immediately before some suit is brought with respect to the easement, a variety of valuable easements would be altogether destroyed if a plaintiff was not entitled to resort to the common law modes of claiming easements. (*Ibid*). See also Lord Blackburn's judgment in Dalton *v.* Angus, 6 App. Cas., 740, at p. 814.

[2] See Bagram *v.* Khetter, 3 B. L. R., O. C., 18; Elliot *v.* Bhuban, 19 W. R., 194, P. C.; and Rajrup Koer *v.* Abul Hossein, I. L. R., 6 Calc., 394; (S. C.) 7 C. L. R., 529, P. C.

[3] See p. 55 (note), *supra*.

[4] See Mahomed Ali *v.* Joogul, 14 W. R., 124; Rajrup Koer *v.* Abul Hossein, I. L. R., 6 Calc., 404, P. C.; 6 App. Cas., 801, 812. The foundation of prescription is the presumption of law that a person found in undisturbed enjoyment of a right did not come into possession by an unlawful act. (William's Rights of Common, 13). See note (3), p. 8, and note (3), p. 403, *supra*.

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subject, as regards the territories respectively administered by the Governor of Madras in Council, and the Chief Commissioners of the Central Provinces and Coorg, is contained in secs. 15—17 of Act V of 1882. From the 6th of March 1891, Act VIII of that year has extended the Act of 1882 to the territories respectively administered by the Governor of Bombay in Council, and the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh. As regards the rest of British India, (namely, the Lower Provinces of Bengal, the Panjab, Assam, Ajmir, and British Burmah) secs. 26 and 27 of Act XV of 1877 contain the present law for the acquisition of easements by statutory prescription.

Acts V of 1882 and VIII of 1891.

It has been held that the object of Act IX of 1871 in enacting a rule for the acquisition of easements by possession or enjoyment, was to make more easy[s] the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. The Act was remedial, and was neither prohibitory nor exhaustive. The same remark applies to the corresponding rule of Act XV of 1877. A man may acquire a title under it who has no right at all, but it does not exclude or interfere with other titles and modes of acquiring easements.[s]

The law is remedial, and neither prohibitory nor exhaustive.

The Indian Acts not having made any distinction between a twenty years' user and a forty years' user, we have one mode of acquiring easements by statutory prescription.

The only other mode of acquiring such rights by long enjoyment in this country is that which rests on immemorial prescription or on the presumption of a lawful origin. The length of the period of enjoyment necessary for this purpose is left indefinite by the decisions on the subject. It is sometimes said that the possession or user must be immemorial,

Presumption of a lawful origin.

Duration of enjoyment required.

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[s] *Per* Sir M. E. Smith, in Rajrup Koer's case (I. L. R., 6 Calc., p. 403). The object of the provisions in the Indian Limitation Acts was not to enlarge the extent and operation of the easement, but "to provide another and more convenient mode of acquiring such easements—a mode independent of any legal fiction and capable of easy proof in a Court of law." (Delhi and London Bank *v.* Hemlall Dutt, I. L. R., 14 Calc., 839, at p. 855). But as regards the period of enjoyment required, the establishment of these rights was easier, under the judiciary law in vogue in the mofussil of the Presidencies of Bengal and Madras. See p. 55 (note), *supra*. Besides in no part of British India did the old law require a claimant to prove enjoyment ending within two years of the suit. Act IX and the subsequent Act, however, make the acquisition easier in so far as they confer the right even in cases of the incapacity of the servient owner, and of his ignorance of the adverse enjoyment. See p. 407, *supra*, and note (2), p. 418, *infra*.

Old mode compared with new mode.

[s] I. L. R., 6 Calc., 394, 403, P. C. See also Modhoosoodun *v.* Biseonath, 15 B. L. R., 361 ; Charu *v.* Docowry, I. L. R., 8 Calc., 956.

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Duration of enjoyment required.

so that the origin of it is unknown.'[7] It is also said that the claim may be based on immemorial user, and the right presumed after a twenty-five or thirty years' enjoyment, unless anything is shown to the contrary.'[8] Where the enjoyment had lasted "possibly fifty or sixty years—certainly more than twenty years,"—their Lordships of the Privy Council referred such enjoyment to a legal origin, although the enjoyment, having been interrupted for more than two years before the institution of the suit, was not sufficient to establish a title under the rule of statutory prescription.[9] In one case, in which the claimant alleged a fifty or sixty years' user, the Calcutta High Court, without determining the length of time necessary to give rise to the presumption of a grant or other legal origin, directed the lower Court to find, if there was evidence of enjoyment of such a character and duration as would justify the presumption.[10] As to the duration of the enjoyment required (to raise the

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[7] "Long and undisturbed user or possession, when the origin of it is unknown, confers a title, because no other inference can be drawn than that the possession is, in some way or other, founded on title, although it is not known whence or how the title was obtained." Goorco Pershad *v.* Bykunto, 6 W. R., 82, 83. Knowledge of the time when such user or possession commenced is fatal to a claim by immemorial prescription. (See Wheaton *v.* Maple, 1893, 3 Ch., 48). What was technically considered a prescription might always be rebutted by showing by testimony when the enjoyment of the right claimed had its origin or beginning. (Washburn, 4th Ed., p. 32).

"Immemorial user must be referred to a legal origin, that is either to a lost grant or to an agreement between the predecessors in title of the parties." Punja *v.* Bai Kuvar, I. L. R., 6 Bom., 20, 23.

In England, proof of an enjoyment as far back as living witnesses could speak would raise the presumption of an enjoyment from the time of Richard I. Jenkins *v.* Harvey, 1 Cr. M. & R., 894; Tudor, 180. Even twenty years' user may raise such a presumption—Goddard, 116.

No practical distinction between prescription and presumption.

It may be remarked that practically, in modern use, the distinction between the ancient doctrine of technical prescription, and the modern one of a presumed grant, where the deed of grant is assumed to be lost, is not observed when speaking of titles acquired by long continued user and enjoyment, the terms "prescription" and "prescriptive rights" being now used to express the whole class of titles, the evidence of which depends upon such user and enjoyment. (Washburn, p. 33).

As to the original meaning of the term "immemorial," see p. 7, note (10), *supra*. The present peculiar English sense of the term is an accidental, not an essential, part of the law of prescription. (Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, 40).

User *exceeding* 20 years, required.

[8] Koylas *v.* Sonatun, I. L. R., 7 Calc., 132, 136. As the Legislature has since July 1871 adopted the 20 years' rule, enjoyment for twelve years can no longer be considered sufficient to raise the presumption of a lawful origin; and as the enjoyment need not continue till within two years of the suit, the period now required should exceed 20 years. See p. 415, *infra*.

[9] Rajrup *v.* Abul, I. L. R., 6 Calc., 394, P. C.

[10] Achul *v.* Rajun, I. L. R., 6 Calc., 812.

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presumption of a lawful origin) in the mofussil of Bengal and Madras, before July 1871, there was also a diversity of opinion.[1] But the weight of authority was in favor of the position that a grant of an easement might be presumed from a twelve years' user.[2]

Quality of enjoyment required.

Before Act IX of 1871 came into operation, it was held by the Calcutta High Court, specially in the case of affirmative easements, that the enjoyment must be uninterrupted,[3] adverse[4] (that is, not permissive, but as of right[5]) and open.[6] In a case of a right to light it was held, on the Original Side of the Calcutta High Court, that the enjoyment must be uninterrupted and acquiesced in by the owner of the servient tenement, or by his agent.[7]

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[1] Rajah Bijoy *v.* Obhoy, 16 W. R., 198.

[2] Kurupam *v.* Meranji, I. L. R., 5 Mad., 253, 255. See also p. 55, note, *supra*. Thirty years' enjoyment was required in the mofussil of the Bombay Presidency—see *Ibid.* Lord Mansfield, Wilmot, C. J., and Sir Barnes Peacock, C. J., were of opinion that such incorporeal rights ought to be decided by analogy to the Statute of Limitation. (See Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, at pp. 43 and 44). The *quasi*-Parliamentary period of twenty years was adopted in the Presidency-towns.

Prescriptive period fixed in analogy to limitation.

The Roman jurists recognised an acquisition of servitudes by *longa quasi-possessio* of ten years *inter presentes*, or 20 years *inter absentes*. This required neither *justus titulus* nor *bonâ fides*, but only freedom from the three vices of possession, *viz.*, violence, secrecy, and precariousness. The possession was required to be *nec vi*, *nec clam*, and *nec precario*. This mode of acquisition was never called *usucapio*, or *longi temporis præscriptio*. See Poste, Gaius, pp. 194, 582 ; see also pp. 17-19, *supra*.

Roman law. Three vices of possession.

[3] Joyprokash *v.* Ameer Ally, 9 W. R., 91 ; Askar *v.* Rammanick, 13 W. R., 344 ; Futteh Ali *v.* Asgar Ali, 17 W. R., 11. Where the user is from time to time interrupted by the owner resuming, as occasion may require, the exclusive use of his land, the user will be treated as permissive only, and not as the exercise of a right. Aukhoy *v.* Mollah, 13 W. R., 449.

[4] Joyprokash *v.* Ameer Ally, 9 W. R., 91. Even where an easement is sought to be established by immemorial user, enjoyment "as of right," and "as an easement" must be proved. (Chunilal *v.* Mangaldas, I. L. R., 16 Bom., 592, 595).

[5] Askar *v.* Rammanick, 13 W. R., 344. Enjoyment at the mere will and favor of the owner of the land is not enjoyment as of right. Futteh Ali *v.* Asgar Ali, 17 W. R., 11.

[6] Mahomed *v.* Joogul, 14 W. R., 124. In the other cases referred to in notes 3, 4, and 5, nothing is said about the user being open. But "as of right," in English law, means peaceable, open, and "not permissive."

[7] Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, 54 ; Elliot *v.* Bhoobun, 19 W. R., 194, P. C. The law applicable, in this case, was the English law before the passing of the Prescription Act.

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Absence of the three *vices* of possession.

As observed by Bowen, J., in *Angus* v. *Dalton*,[8] the cantilena *nec clam, nec vi, nec precario*, is a doctrine which is applicable to every case in which inchoate user is matured by length of time (apart from Statute) into the presumption of a right acquired at a neighbour's expense. The presumption arising from such user for twenty years is rebutted by proof of the incapacity of the servient owner to acquiesce in or resist the user. In India, as in England, the effect of any disability on the part of such owner, as well as of any restrictions arising from the state of the title, must, of course, be taken into consideration.[9]

Non-user of acquired right.

A right acquired by enjoyment existed until it was expressly or impliedly abandoned or otherwise extinguished.[10] It was held in one case that a right of way was lost by non-user for six years,[1] but non-user was, in general, regarded as evidence from which (coupled with other circumstances) a release or abandonment might be implied.[2] Non-enjoy-

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[8] Angus *v.* Dalton, 6 App. Cas., 740, 785. See also Lord Selborne's judgment at p. 786, and Lord Blackburn's judgment at p. 819. See Benest *v.* Pipon, 1 Knapp., P. C. C., 70.

Ignorance of servient owner.

[9] See 3 B. L. R., O. C., 18, 47, 54; Arzan *v.* Rakhal, I. L. R., 10 Calc., 214, 218; Angus *v.* Dalton, 6 App. Cas., 740, 751, 827. Acquiescence implies knowledge. There can be no presumption of a grant if the servient owner is ignorant of the user. If the servient owner is living near the *locus in quo* and has frequently been on the property, a presumption would naturally arise that he knew of the user, and the onus would certainly be on him to prove that he was ignorant of it. (Goddard, 3rd Ed., p. 224). A grant will not be presumed against an ignorant man, not in possession at the time of that which is to give him knowledge of the fact, and from whence knowledge would be presumed. (Wheaton *v.* Maple, 1893, 3 Ch., 48, at p. 57). See pp. 406–8, *supra*, and p. 418, note 2, *infra*.

Effect of non-user *after* acquiring right.

[10] Khetter Nath *v.* Prossuno, 7 W. R., 498. See also Juggut *v.* Juggut, 12 W. R., 519. Non-user is not by itself conclusive evidence that the right is abandoned, for it may be explained by, and must be considered with, the surrounding circumstances; it must, moreover, always be a question as to the intention with which the user was given up. (Goddard, 3rd Ed., pp. 497, 498). Where a new way is substituted for an old one with the consent of the person entitled, and the non-user of the original way is accompanied by acts which warrant the Court in inferring an intention to release, the right of resumption is lost, and the non-user need not extend over any defined period. (Per Couch, C. J., in Raj Biharee *v.* Tara Pershad, 20 W. R., 188). In the absence of such circumstances, the old right is not presumed to have been abandoned or released, even after 20 years' non-user. (Lovell *v.* Smith, 3 C. B. N. S., 120).

[1] Hurreedoss *v.* Jodoonath, 5 B. L. R., App., 66. But non-user for seven years had no such effect given to it in Kurupam *v.* Meranji, I. L. R., 5 Mad., 253.

[2] Kena *v.* Bohatoo, Marshall, 506; Juggut *v.* Juggut, 12 W. R., 519. See also Brown, p. 229; and Ward *v.* Ward, 7 Exch., 838, in which a right, where there was no occasion to exercise it, was (in England)

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ment for two years before the suit did not invalidate the right.

Enjoyment not required to continue till within two years of suit.

A right of easement acquired by long enjoyment, independently of the Acts of 1871, and 1877, may be enforced even if the easement has been obstructed for more than two years. (*Rajrup Koer* v. *Abul Hossein*, I. L. R., 6 Calc., 394, 402).

Otherwise under the statutory rule.

Since the first of July 1871, the period of enjoyment required by the rule of statutory prescription is twenty years, ending within two years of the suit in which the right to the easement is contested, so that, if the enjoyment of the right ceased more than two years before the institution of such suit, the right cannot be held to have been acquired.

25 or 30 years' enjoyment, whether ending within two years of suit or not, will raise the *presumption*.

As the law expressly requires an enjoyment of twenty years for the acquisition of easements, by prescription proper, the presumption of a lawful title from long enjoyment, it is apprehended, cannot now arise, unless the enjoyment has lasted for more than twenty years.[3] Possibly, as suggested by Sir Richard Garth, C. J., in *Koylas* v. *Sonatun*,[4] twenty-five or thirty years' enjoyment would be sufficient for the purpose, if there are no circumstances to rebut the presumption of a lawful origin or title. A title thus proved may be relied on, especially in cases where the claimant cannot show that his enjoyment continued within two years of the suit in which his right is disputed. And even if it be shown that the enjoyment of the easement commenced within time of living memory,—as, for instance, that it did not exist thirty or forty years before, but originated about twenty-five years ago—the presumption of a lawful title from such long enjoyment will not be rebutted.[5]

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held to survive a non-user for more than twenty years. See note 10, *supra*.

[3] But a person who had acquired an easement by an enjoyment for twelve years and upwards, before Act IX of 1871 came into operation, is not prevented by that Act or Act XV of 1877 from suing to establish his right, although such enjoyment has ceased or has been obstructed for more than two years before the suit. (Kurupam *v.* Meranji, I. L. R., 5 Mad., 253, 255). Enjoyment for a period shorter than twenty years, coupled with other circumstances, may still lead to an inference of an actual grant. See Goddard, 3rd Ed., p. 201. See p. 412, *supra*.

[4] I. L. R., 7 Calc., 132, 136; see notes 7 and 8, p. 412, *supra*.

[5] Joyprokash *v.* Ameer Ally, 9 W. R., 91. In this case the suit was commenced in 1866, and the easement was shown not to have been in existence in 1841. In Rajrup Koer's case (I. L. R., 6 Calc., 394, P. C.), also the watercourse was constructed within time of living memory.

Different uses of the term prescription.

Using the term 'prescription' for 'immemorial prescription,' Sir Barnes Peacock, C. J., said: "prescription in England is not the same as prescription in the mofussil" (9 W. R., 91). Using the term for 'prescription.'

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The present statutory rule of prescription.

Act XV of 1877 and Act V of 1882 enact the general* rule that where any easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to the easement shall be absolute and indefeasible. The period of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested. Provided that when the servient tenement has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term, shall be excluded in the computation of the said period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the reversioner or the remainderman.†

A fluctuating body of persons cannot claim under the rule.

The word "person," according to the General Clauses Act, includes a body of individuals, whether incorporated or not. But it has been held that an unincorporated and fluctuating body of persons like "the tenants of certain pergunnahs" cannot derive any benefit from this rule of

'prescription by the fiction of a lost grant' or 'prescription by the presumption of a lawful origin,' Sir Richard Garth says: "Easements may still be claimed in this country, by prescription, and when they are so claimed, the principles which apply to their acquisition in England will be equally applicable in this country. But those principles do not necessarily apply to the acquisition of easements under the Limitation Act." (Arzan v. Rakhal, I. L. R., 10 Calc., 214, 218). To support a claim to an easement by prescription, in England, it is essential that it should be possible to presume (except perhaps in the case of a right to support) that there had been a grant of the right, and no alteration was made in the law in this respect by the English Prescription Act, except in cases of right to light. (Goddard, 3rd Ed., p. 259). It may be added that under the statute, 20 years' user of light, and 40 years' user of ways and other easements, are, in this respect, in the same predicament. See p. 406, *supra*.

* In respect of light, air, and support, the rule is slightly different. See pp. 418, 425, *infra*. It should be noted that only easements proper (*i.e.*, *prædial* servitudes) may be acquired under the statutory rule in provinces to which Act V of 1882 applies. Secs. 26 and 27 of Act XV of 1877 are not now in force in such Provinces, and even a profit in gross cannot be acquired by prescription under Act V of 1882. But long enjoyment may still raise the presumption of a lawful origin. See note (9), p. 390, *supra*.

† Sec. 27, Act XV of 1877; and sec. 16, Act V of 1882.

* In England, it is only the reversioner who is entitled to this exclusion in the computation of the prescriptive period. See Laird v. Briggs, 19 Ch. D., 22. The Indian law is in accordance with the view taken by Fry, J., in the Court of first instance. The words of the Indian law give the benefit of the proviso to "the person entitled on such determination, to the said land."

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prescription. It must be shown that the same determinate person or persons claiming title to the easement have enjoyed the right for the required length of time. This cannot be done in the case of a variable body.* And as an unincorporated fluctuating body cannot be the owner of a (dominant) heritage, such a body cannot claim an easement under Act V of 1882. Corporations may prescribe in a quasi-estate; but if a company is incorporated for a particular purpose, it cannot accept a grant of an easement for a different purpose, and consequently cannot (in England)* acquire a right by prescription, if the title thereto is founded upon a presumption of such a grant. (National G. M. Co. v. Donald, 4 H. & N., 8; Goddard, 4th Ed., 230). And for the same reason an easement cannot be acquired (in England) by prescription against a corporation established for a particular purpose unconnected with that easement, for any grant of such a right would be *ultra vires* and void. (*Ibid.*) The theory of presumed grants, however, is not recognized either by Act XV of 1877 or Act V of 1882.

Corporations may claim.

It is necessary that the enjoyment of the easement should be peaceable or without opposition. Enjoyment by force or violence, enjoyment during strife or contention of any kind, enjoyment continually disputed and interrupted (even where such interruption is not acquiesced in for one

Peaceable enjoyment.

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* See Lachmeepat v. Sadaullah, I. L. R., 9 Calc., 698, 703. Prescription is personal, custom is local. Dedication is general, *i.e.*, in favor of the whole public. (See Washburn, pp. 203, 205). It has been held in America that a permissive use of a way by certain portions of the community constitutes a license and not a dedication. (Washburn, 213).

Prescription, (private rights). Custom, (village rights). Dedication, (public rights).

A variable body, such as the residents of certain villages, may claim a convenience or easement by custom. In England, a profit *à prendre* cannot be claimed by such a body even by custom. The right of the tenants of a certain village to graze cattle on the bed of a certain tank vests in each tenant severally as well as jointly with the other tenants. Such a right is not a public right in the sense that no action can be brought upon it unless special damage is proved. (Venkatachela v. Rappusami, I. L. R., 11 Mad., 42). It is otherwise if the right is claimed on behalf of the public generally (1 Mad. L. J., 47). "The public cannot acquire a right of way by prescription, but must take by dedication." (Goddard, 4th Ed., p. 229). "The public cannot, in law, custom or prescribe for a profit *à prendre in alieno solo*, nor acquire any right adversely to the owner under any statute of limitation." (Neill v. Duke, 8 App. Cas., 135). As a variable body, the public, as such, cannot claim any right by prescription. The (general) public cannot do so even by custom. (See pp. 357, 358, *supra*; Bourke v. Davis, 44 Ch. D., 110). Nor by the presumption of a lost grant. (Smith v. Andrews, 1891, 2 Ch., 678, at pp. 690, 700). The right of the public to fish in the sea (or in public navigable rivers) is a natural right. It is not necessary to acquire such right in any particular mode. (See Baban v. Nagu, I. L. R., 2 Bom., 19., 32).

Public can not claim by grant.

Natural public rights.

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year) is not *nec vi* or peaceable.[10] Repeated interruptions in fact, though each too short to operate as "an interruption" within the meaning of the Acts, are good evidence to show that the user all through was "contentious."

Enjoyment must be open, except in the case of light, air and support.

The enjoyment must be open and manifest, not clandestine, furtive or invisible. If the enjoyment is had secretly or by stealth, if it is had surreptitiously in order to keep the fact of enjoyment from the knowledge of the servient owner, it is not open or *nec clam*.[1] But so long as the enjoyment is not secret, it is not necessary that the servient owner should have actual knowledge of the user; his ignorance of the claimant's enjoyment does not prevent the latter from acquiring the right under either of the two *Acts*.[2] It may be mentioned here, that, under Act XV of 1877, it is not necessary to prove publicity or openness of enjoyment in the case of the acquisition of a right to the access or use of light or air[3]; and that, under Act V of 1882

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[10] Goddard, 153, 154; 3rd Ed., p. 231; Eaton *v.* Swansea Waterworks Company, 17 Q. B., 267. As the Indian law expressly requires peaceable enjoyment, it is hardly possible, here, to contend that "the law operates if the enjoyment has once been as of right, and afterwards becomes contentious, provided there is no interruption within the meaning of the law."

[1] See Angus *v.* Dalton, 6 App. Cas., 740, 801, 802; Mothura Dass *v.* Bai Amthi, I. L. R., 7 Bom., 522.

Ignorance.

[2] It was the same under Act IX of 1871. The fact that the servient owner is ignorant of the user, or has been incapable of resisting it, by reason of minority, insanity or want of a present right to possession (except where sec. 27 of Act XV or sec. 18 of Act V applies), is no bar to the acquisition of the right. See *Ind. Gaz.*, 13 Nov. 1880, Part V, p. 477; Arzan *v.* Rakhal, I. L. R., 10 Calc., 214. But the presumption of a lawful origin from long enjoyment (independently of the provisions of Acts IX of 1871, XV of 1877, and V of 1882) may be rebutted, even in the mofussil, if the servient owner is ignorant of such enjoyment or user, and there are no facts from which knowledge may be presumed. (See Goddard, 3rd Ed., pp. 183, 223; 4th Ed., 231; I. L. R., 10 Calc., 214, at p. 217; p. 414, *supra*). Open enjoyment is not, necessarily, sufficient to raise the presumption of knowledge as against an absentee or a reversioner.

Right to light.

"As of right."

[3] It was the same under Act IX of 1871. In the case of windows or light, the condition of publicity is almost necessarily fulfilled—see Angus *v.* Dalton, 6 App. Cas., at p. 787. If the enjoyment of the light and air is open, and had in such wise as not to involve the admission of an obstructive right in the owner of the alleged servient heritage, it is an enjoyment "as of right." (Mathuradas *v.* Bai Amthi, I. L. R., 7 Bom., 522). Under the English Prescription Act, the enjoyment, in the case of claims to light, is not required to have been "as of right," and it has been held (Plasterer's Company *v.* P. C. Company, 6 Exch. 630), that these claims may be sustained even though the enjoyment was had by permission, and although rent or an annual sum had been paid for permission to enjoy the light (Goddard, 4th Ed., 273). This ruling cannot apply to claims to light under Act V of 1882 unless the permission amounts to a grant of an indefeasible easement (see *Sup.*

Permissive enjoyment under English and Indian Acts.

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the right to light, air or support may be acquired even if the enjoyment has not been open, or as of right.[a]

Enjoyment as an easement necessary.

The claimant must have enjoyed the right as an easement. If there had been unity of possession and ownership during the whole or any part of the required period, he would not have enjoyed an easement, but the soil itself.[b]

Unity of title and unity of possession.

Mere unity of possession also, during even a part of the twenty years, is fatal to a claim under the Acts.[c] A tenant of land cannot acquire an easement by prescription over other lands in his occupation, though such lands are held under a different landlord. And the owner of a house being tenant and occupier of the adjoining land cannot so acquire an easement over such land.[d] The enjoyment must have been had by a person "claiming title thereto, as an easement" as distinguished from a right of ownership[e]

I, section 15, Act V of 1882). Nor is the ruling applicable to claims to light under the English Prescription Act, if the light was enjoyed by some consent or agreement expressly made or given for that purpose by deed or *writing*. (Mitchell *v.* Cantrill, 37 Ch. D., 56). Under Act XV of 1877 all claims to light and other easements are invalid unless the enjoyment has been "as of right." See p. 425, notes, *infra*.

Unoccupied buildings.

In the case of light and air under Acts IX of 1871 and XV of 1877, and in the case of support, as well as light and air, under Act V of 1882, it is not necessary that the dominant building should be occupied (Light, air, support). by any person. It is sufficient if the light or air or support has been received by the building. (See Gale, 172; Pranjivandas *v.* Myaram, I Bom., 148). These Acts do not require that these rights should be enjoyed "by any person claiming title thereto."

[a] Light is not required to be enjoyed as of right, because any person has a right to so much light as can come in at his windows. (Frewen *v.* Phillips, 30 L. J. C. P., 357; 1 Stokes, 904).

Unity of title, and of possession.

[b] Goddard, 151, 154, 157. "Whilst unity of possession (and ownership) lasted, no question of easement could arise." (J. Anderson *v.* Juggodomba, 6 C. L. R., 282, 284). Unity of title or ownership in fee, even without unity of possession, extinguishes easements. Goddard, 367; sec. 46, Act V. If the dominant owner purchases the servient heritage jointly with another, there is no unity of title, and the easement is not extinguished. (Poste, Gaius, p. 181; Illus. (*e*) and (*f*), sec. 46, Act V). Easements once acquired are extinguished by unity of ownership, *i.e.*, when "one man hath as high and perdurable an estate in the one as in the other." (Lord Coke). Unity of possession only renders the enjoyment not "as of right." (Modhoosoodun *v.* Bissonath, 15 B. L. R., 361). It would be more accurate to say that enjoyment during unity of possession is not enjoyment "as an easement." See p. 405, note 3, *supra*.

[c] See Gale, 5th Ed., 168; Modhoosoodun *v.* Bissonath, 15 B. L. R., 361; Goddard, 3rd Ed., 231. Cf. Hollins *v.* Verney, 13 Q. B. D., 304, at p. 313. See Gale, 6th Ed., pp. 208, 209; p. 406, *supra*, and note (*s*), *infra*.

[d] Harbidge *v.* Warwick, 3 Exch., 552; pp. 367, 368, notes 5 and 7, *supra*. As to a tenant's claim against his own landlord, see Udit *v.* Kashi, I. L. R., 15 All., 185, F. B.

[e] See paragraph 2, sec. 26, Act XV of 1877, which applies to easements other than those of light and air. See also paragraph 3, sec. 15,

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(Trustees).

But where a trustee of one heritage is the beneficial owner of another, and both heritages are in his possession, an easement over the latter may, perhaps, be acquired for the beneficial enjoyment of the former. Thus, though the freehold of the church and the glebe are both vested in the rector, the church may (perhaps) acquire easements over the glebe.[7]

Is tacking allowable.

The operation of unity, under the Acts, is, perhaps, not merely to suspend the process of acquisition while it lasts, but to destroy altogether the effect of the previous user by breaking the continuity of the enjoyment as an easement and as of right. In computing the period of twenty years, it is (perhaps) not allowable to exclude the time during which the unity continued, and to tack the period of subsequent enjoyment to that of the previous user.[8] Exclusion in the computation of the period is expressly allowed only in the case of the servient owner being not entitled to present possession during a part of the period of enjoyment.[9] The English Statute and the Indian Acts, generally speaking, contemplate a continuous (though not incessant) enjoyment of the right for twenty years.[10]

Act V of 1882. See further the remarks of Sargent, C. J., in Chunilal v. Mongaldas, I. L. R., 16 Bom., 592, at p. 595.

[7] Eccl. Commissioners *v.* Kino, 14 Ch. D., 213. Mr. Goddard doubts the correctness of this dictum of Brett, L. J. See 3rd Ed., pp. 15, 232.

Effect of unity of possession during the 20 years.

[8] Modhoosoodun *v.* Bissonath, 15 B. L. R., 361 ; Onley *v.* Gardiner, 4 M. and W., 496 ; Gale, 215, 216. It is otherwise in England in the case of a right to light. (Ladyman *v.* Grave, L. R., 6 Ch., 763). The Editor of the 6th Edition of Gale on Easements (Mr. Cave) observes that the point whether mere unity of possession, while it lasts, suspends the process of acquisition of easements other than light, or whether such unity destroys altogether the effect of the previous user, under the statute, cannot now be regarded as settled. (See Gale on Easements, 6th Ed., pp. 163, 208, 209). The case of Modhoosoodun *v.* Bissonath (15 B. L. R., 361) was decided before any doubts had been raised by the dicta of the Court in Hollins *v.* Verney (13 Q. B. D., 304, 313). It may possibly be held now that the period of unity (in cases of all easements) may be excluded so as to extend the required period of continuous enjoyment by so long a time as the unity lasts. See p. 406, *supra*, and pp. 435, 436, *infra*.

[9] See sec. 27, Act XV of 1877 ; and sec. 16, Act V of 1882.

Cessation, voluntary. Interruption, adverse.

Unity does not "interrupt."

[10] See Goddard, 155, 4th Ed., 241 ; Tudor's Leading Cases, 3rd Ed., p. 188. A total cessation of user by the voluntary act of the person claiming the right may cause a breach in the continuity of the enjoyment of the right. But if the non-user is duly accounted for, such cessation may be consistent with an inference of a continued enjoyment of the right. (Hollins *v.* Verney, 13 Q. B. D., 304. See p. 431, note, *infra*). In Ladyman *v.* Grave (L. R., 6 Ch., 763, 768), Lord Hatherly, C., held that an interruption by unity of possession was not an adverse interruption, and that the enjoyment may be uninterrupted notwithstanding such unity. And in Hollins *v.* Verney (13 Q. B. D., 304, at p. 313), the Court of Appeal thought that there was no reason why the fact of the dominant and servient tenements, having been occupied together during a part of the twenty years, should be necessarily fatal

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Another quality of the requisite enjoyment is that it must be "as of right." Lord Denman, C. J., held that enjoyment as of right in the English Statute meant an enjoyment had openly and notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal or not, yet lawful to the extent of excusing a trespass.[1] In the words of Erle, J., "if the enjoyment has been clandestine, contentious, or by sufferance, it is not of right."[2] It is evident that, in the Indian Acts on the subject, the expression "as of right" has a less extensive meaning. The Legislature, here expressly requires that the enjoyment must be "as of right," as well as "open," "peaceable," and "as an easement." Enjoyment must be *as of right.*

The distinction made between written and parol license, and the other provisions of the English Prescription Act, show that enjoyment "as of right" under 2 and 3 Wm. IV, c. 71, is not confined to an adverse right. Enjoyment had by *parol* license given before the commencement of the user and extending over the whole period of prescription may (in the third mode of claiming an easement) be enjoyment "as of right." (See Goddard, 3rd Ed., pp. 229, 230; Gale, 5th Ed., pp. 167, 171). But at the common law in England, and under the law of British India, parol or written license given before or during the prescriptive period renders the enjoyment "precarious," *i.e.*, not "as of right." According to Expl. 1, sec. 15, Act V of 1882, Enjoyment by license.

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to the acquisition of a prescriptive right. See foot-note (8), *supra*, and pp. 430—32, *infra*.

[1] Tickle *v.* Brown, 4 A. & E., 369; Goddard, 152. The easement must have been enjoyed in the manner that a person rightfully entitled would have used it, and not as a trespasser would have done. And the claimant must not have occasionally asked the permission of the servient owner. See the judgment of Parke, B., in Bright *v.* Walker, 1 Crompton, Meeson and Roscoe's Reports, 211, 219. Enjoyment "as of right"—*claiming* to do, and actually *doing*, not by way of permission, not by way of concession on the part of the alleged servient owner, but as of right, that is to say, as a thing which the claimant was entitled to do under some right or other. (Per James, L. J., in Earl De La Warr *v.* Miles, 17 Ch. D., 535, at p. 584). It has been decided that enjoyment by permission (Monmouth C. Co. *v.* Harford, 1 Cr. M. & R., 614), contentious user (Eaton *v.* Swansea Waterworks, 17 Q. B., 267), enjoyment as owner or occupier of the servient tenement (Battishill *v.* Reed, 18 C. B., 696, and Harbidge *v.* Warwick, 3 Ex., 552) are not enjoyments as of right within the statute. See Hollins *v.* Verney, 13 Q. B. D., 304, at p. 307. As to licenses, see pp. 406—9, notes, *supra*. "As of right." Claiming a right to do a thing, and actually doing it.

Concessions made by the owner which give enjoyment to others, without harming him, or even at some personal sacrifice to himself, should not be used against the owner as evidence of an adverse right. (Smith *v.* Andrews, 1891, 2 Ch. D., 648, at p. 702). See pp. 424—5, *infra*. Concessions.

[2] Eaton *v.* Swansea Waterworks, 17 Q. B., 267, at p. 275; Gale, 209.

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enjoyment under an agreement (written or oral) with the alleged servient owner is no enjoyment unless the latter appears to have granted the right as an indefeasible easement. See pp. 408, 409, *supra*, and pp. 424, 425, *infra*.

"As of right."

In *Alimoodeen* v. *Wuzeer Ali*,[3] Mr. Justice Markby, after referring to the difficulties which arose upon the interpretation of this expression in the English Statute, held that here it signifies no more than that the enjoyment must be by a person in the assertion of a right. It is not necessary that the claimant should have enjoyed the easement "rightfully" or "without trespass."[4] If he claims a title to the easement, and the easement is not enjoyed under a license or permission from the owner of the servient heritage, his enjoyment is "as of right," or *nec precario*.[5] A person who, during the requisite period of enjoyment, asks the permission of the servient owner, does not assert a right to the easement. By asking for permission, he admits that he then has no right. Each renewal of the license rebuts the presumption that the enjoyment is had under a claim of title to the easement.[6] In the case of a negative easement (*e.g.*, of light or air), the inchoate enjoyment of the right is, in the eye of the law, no injury

[3] 23 W. R., 52.

[4] Markby's Elements of Law, 3rd Ed., secs. 579—582.

[5] Gale, 213. See also note 1, *supra*.

Not "as of right" or adverse, if referable to an *admitted* right.

In The Secretary of State *v.* Mathurabai, I. L. R., 14 Bom., 213, user by the inhabitants of a village of a right of grazing their cattle on a *particular* plot of the waste lands of the village, was (in the absence of special circumstances proving the user to have been adverse or as of right) held to have been not "as of right," within the meaning of the law of prescription; but referrable to the general right which the villagers had under an admittedly existing custom of grazing their cattle in some part or other of the waste lands of the village.

Inconsistent titles.

But where a person claims a profit *à prendre* under a custom, as one of the inhabitants of a village, and also alternatively by prescription in respect of his own particular heritage, the alternative claim by prescription may be sustained although it is in evidence that he had claimed to take the profit under the mistaken supposition that all the villagers were entitled to do so under some decree or some custom. It is immaterial on what ground or title the claimant rested his right to enjoy the profit. (Earl De La Warr *v.* Miles, 17 Ch. D., 535). Taking a profit under a claim to a customary right (which is in England legally invalid) may nevertheless be doing the thing under a claim of right as appurtenant to a single heritage, and, as such, sufficient to give a right under the law of prescription. (*Ibid.*, pp. 585, 594).

Inconsistent claims.

As to inconsistent and alternative claims, see pp. 367, 368, 401, 402, *supra*. Claiming a right of way as a public right is not fatal to a subsequent claim of a private right of way. (Arzan *v.* Rakhal, I. L. R., 10 Calc., 214, at p. 219).

[6] Gale, 168, 171, 213; Goddard, 153. See note 9, p. 408, *supra*.

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or wrong to the owner of the adjacent heritage who is at liberty to obstruct the enjoyment by some act done on his own heritage.' If the open enjoyment of such an easement is not actually obstructed, and it is "not had in such wise as to involve the admission of an obstructive right" in the owner of the adjacent heritage, the easement is enjoyed "as of right" within the meaning of Act XV of 1877.[8] Enjoyment which no one has a right to obstruct, as the enjoyment of an easement over land in the possession of the claimant himself, is not adverse enjoyment, or enjoyment as of right.[9] Such enjoyment may be open to the further objection that it is not an enjoyment as an easement. Enjoyment which has been had adversely to the owner of the servient heritage "as the exercise of a right," and not at the mere will and favor of such owner, is enjoyment as of right.[10] A tradesman, or a friend, who daily opens my gate and walks up to my door, under a tacit permission, which may be revoked at any moment, is not at all in *quasi*-possession or enjoyment of an easement.

"As of right" in case of negative easements

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[7] When the ower of a dwelling-house opens new windows, he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of building on his land. *Per* Lord Westbury in Tapling *v.* Jones, 11 H. L. C., 290. See Goddard, p. 308. But as to Indian *Customs*, see p. 385, note 9, *supra*.

Opening a new window, no wrong.

[8] Mathuradas *v.* Bai Amthi, I. L. R., 7 Bom., 522.

[9] Modhoosoodun *v.* Bissonath, 15 B. L. R., 361.

[10] Askar *v.* Rammanick, 13 W. R., 344; Aukhoy *v.* Mollah Nobee, 13 W. R., 449; Futteh Ali *v.* Asgur Ali, 17 W. R., 11.

"Adverse possession" should, however, be distinguished from *quasi*-possession or enjoyment "as of right." Chundee *v.* Shib, I. L. R., 5 Calc., 945.

Sec. 26 of the Limitation Act says nothing about adverse possession. Enjoyment as an easement and as of right is what the section requires. Lachmeswar *v.* Manowar, I. L. R., 19 Calc., 253, at p. 263, P. C.

Adverse possession, and *quasi*-possession as of right.

In the case of positive easements, *quasi*-possession as of right is partially analogous to adverse possession. The owner has a right of action for the adverse possession of the land or the adverse user of an easement over the land; but "user as of right" does not, as "adverse possession" does, oust the owner from his *occupation* of the land. In the case of the negative easement of light or air, the enjoyment is had *without trespass* on the neighbour's land, and the enjoyment is presumably as of right if it is submitted to or not obstructed by, the neighbour. The difficulty of proving that the enjoyment of a negative easement has been an enjoyment *as of right* is referred to in Markby's Elements of Law, 3rd Ed., secs. 578—582, and also in Bagram *v.* Khetternath, 3 B. L. R., O. C., 18; and Bhoobun *v.* Elliot, 6 B. L. R., 85. (See the judgments of Markby, J.) Mr. Justice Markby, following Savigny, held that the enjoyment of a negative easement was not enjoyment *as of right* unless it appeared that the servient owner was in a manner *compelled to submit* to the enjoyment of the easement. But his

Case of positive easements.

Case of negative easements.

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The grantee of a way for the term of twenty years may be in *quasi*-possession of it, but his enjoyment is derivative like that of a lessee for a term of years, and he cannot acquire an absolute and indefeasible right by prescription against his grantor.[1] If the servient owner or occupier has agreed to allow the user or enjoyment for an unlimited period and as an indefeasible easement, the enjoyment,

What is "enjoyment" within the meaning of the Acts.

opinion as to the necessity of showing such submission or *patientia* on the part of the servient owner in the case of negative easements does not appear to have been adopted or acted upon by other Judges. Actual uninterrupted enjoyment, if it is not affected by an express agreement, and if it does not involve the admission of an obstructive right, has been considered to be practically sufficient for the purpose of raising the presumption of right. Proof of such enjoyment for twenty years is, in all cases, *primâ facie* evidence of a title which must be rebutted by the servient owner. Under Act V of 1882, it is not necessary, in the case of light, air or support, that the enjoyment should be as of right. "As a rule, it is not possible to prove, in the case of such easements, that the enjoyment is as of right in the sense in which these words are now understood." (See the Hon'ble Law Member's speech in the Legislative Council, 16th February 1882. The Hon'ble Member was probably thinking of the difficulty referred to by Savigny and Markby, J.) It may be observed, that, though "enjoyment as of right" is not required in these three cases, enjoyment under an agreement granting a mere license, or granting an easement for a limited period, or subject to a condition of defeasance, is of no avail in the case of any easement positive or negative. (See note 2, *infra*). The tendency of the decisions of many of the Courts in the United States of America is against the English doctrine that a prescriptive right to light may be gained by actual enjoyment, although such enjoyment was not "as of right." (Encyclopædia Brittanica, 9th Ed., Tit. Prescription, p. 706). In New York and eight other States no right to light can be acquired by prescription or implied grant. (Gale, 6th Ed., p. 298). In Scotland positive servitudes only can be acquired by long enjoyment. See note (8), p. 402, *supra*.

20 years' enjoyment *primâ facie* evidence of right.

Enjoyment under a revocable license, is not good in any case in India.

Proof of enjoyment as of right.

Question of fact.

The presumption is that a party enjoying an easement acted under a claim of right until the contrary is shown—Gale, 6th Ed., 199, 203; Gray *v.* Bond, 2 Brod. and Bing., 667; Campbell *v.* Wilson, 3 East, 294. Cf. note (5), *supra*. The question whether the enjoyment had was as of right is a question of fact which must be answered by a consideration of all the circumstances under which the enjoyment had taken place. (Chamber Colliery Co. *v.* Hopwood, 32 Ch. D., 549). The nature and character of the servient land, the friendship or relationship between the servient and dominant owners, and the circumstances under which the user had taken place, may induce the Court to hold that the enjoyment was not "as of right," although there is no direct proof that the enjoyment was had with the permission of the servient owner. (See the judgment of Pigot and Rampini, JJ., in Second Appeal No. 1944 of 1887, dated the 30th May 1888). User must be attributed to mere *tolerance* unless it can be shown that the right claimed and asserted is capable of having a legal origin. Per Lord Watson, in Goodman *v.* Mayor of Saltash, 7 App. Cas., 664. As to concessions, see p. 421, *supra*, and note 1, *infra*.

Tolerance and concessions.

[1] Markby, 3rd Ed., sec. 583. See also Hureedoss *v.* Jodoonath, 14 W. R., 79 (as to the presumption of the enjoyment being under a license when the two owners are near relatives), and expl. 1, sec.

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though in one sense derivative, is valid *quasi*-possession. But enjoyment under a mere revocable license, or a permission granted for a limited period, or subject to a condition on the fulfilment of which it is to cease, is not such enjoyment as would ripen into an absolute and indefeasible right under sec. 15 of the Easements Act, or under sec. 26 of Act XV of 1877.'

Enjoyment by any one in possession of the dominant heritage (and notwithstanding any personal disability of the possessor) may give the owner a prescriptive right. Enjoyment had by a tenant or servant (even without the owner's knowledge), under a claim of right in respect of such heritage, is sufficient.[2] As has been already observed, Enjoyment by whom.

15, Act V of 1882. Until a claim is openly asserted and adversely exercised, any owner of land or fishery may well be content to *allow* others to use his property in a way which gives enjoyment to them without harming him, or even at some personal sacrifice to himself. Privileges so *permitted* could not be claimed and would not be tolerated for one moment "as of right." Such concessions should not be used against the owner as evidence of an adverse right. (See Smith *v.* Andrews, 1891, 2 Ch., 648, at p. 702). As to permissive enjoyment and concessions, see note 1, p. 421, *supra*. "As of right"—open *assertion* of right, and *adverse exercise* of it.

[1] See expl. 1, sec. 15, Act V of 1882. This explanation, it is apprehended, is declaratory of the law as it stood before the passing of Act V of 1882. Under the English Statute even in the case of a right to light, enjoyment by consent of the servient owner, where the consent is expressly given in writing, for the purpose of such enjoyment, does not confer a prescriptive right. (Bewley *v.* Atkinson, 13 Ch. D., 283, 290. Compare Mitchell *v.* Cantrill, 37 Ch. D., 56. See Goddard, 4th Ed., pp. 367, 368, and note 3; p. 418, *supra*). If the agreement is not a mere license revocable at the pleasure of the defendant, but an agreement which creates a right of easement, unlimited in point of time, it is as irrevocable as a grant. Krishna *v.* Rayappa, 4 Mad., 98. License and agreement.

[2] See Gale, 5th Ed., pp. 206, 207; Tudor, 182; and sec. 12, Act V of 1882. One of two or more co-owners of immoveable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property. (Sec. 12, cl. 2). Enjoyment by the owner of a house, "in the persons of his servants and the members of his family," may be sufficient. Per Phear, J., in Shama Churn *v.* Tariny, I. L. R., 1 Calc., 422, 425. Enjoyment by co-sharer, servant or dependent.

A tenant, at common law, can prescribe only in right of his landlord, —the owner of the fee, but under sec. 5 of the English Statute an easement may be claimed in right of the occupier of the land. (Goddard, 4th Ed., p. 16). Although a tenant cannot acquire an easement by prescription, against his landlord, in land belonging to his landlord, yet, according to some authorities, he may acquire one against another tenant of the same landlord. (See notes 5 and 7, pp. 367 and 368; pp. 371-2, *supra*, p. 438, *infra*, and Frewen *v.* Phillips, 11 C. B., N. S., 449, which was a case in respect of light). In England forty years' enjoyment of a way or other easement by one lessee against another lessee, according to those authorities, gives an absolute right against all the world except the reversioner who may resist the right within three years of the determination of the lease. (Per Chitty, J., in Harris *v.* DePinna, 33 Ch. D., 238, 253). The reversioner has no May occupiers of land acquire prescriptive rights against occupiers only of other land.

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the benefit of the easement (strictly speaking) attaches to the dominant heritage, and not to the dominant owner.

Who may acquire prescriptive easements and against whom.

Titles by immemorial prescription as well as by statutory prescription, are absolute and valid against all. A prescriptive easement must be an easement in fee, annexed to the fee-simple estate. (*Bright* v. *Walker*, 1 C. M. & R., 211, at p. 221). It is said that, before the English Prescription Act, one *termor* might acquire an easement against another *termor* by twenty years' user, under the doctrine of a lost modern grant, though in practice the usual course was to state a grant by an owner in fee, to an owner in fee. It has, however, been recently held by the Court of Appeal that an easement for a term of years can only be created, since the Act, as before the Act, by a grant which must be proved as a fact and not be purely fictitious. Such a grant may be inferred as a fact if there is evidence to justify the inference, but there is no legal presumption, as distinguished from an inference in fact, in favor of such a grant. (Wheaton v. Maple, 1893, 3 Ch., 48, at pp. 63, 65). A qualified easement for a term of years, or one annexed to a leasehold interest (supposing such easement is so imposed or granted

Grant by one termor in favor of another.

Qualified easements.

No easement is acquired by prescription unless and until it is absolutely binding against *all* the world.

such right of resistance, in the case of an easement of light, which may be acquired absolutely and indefeasibly by twenty years' user (Palk v. Skinner, 18 Q. B., 568; Simper v. Foley, 2 Johnson and H., 555). Mr. Goddard doubts if the owner of the reversion would be bound by user which he could not resist (4th Ed., p. 274). But it has since been held that 20 years' user of light under sec. 3 of the English Act against a tenant does confer a right against him as well as his lessor. (1893, 3 Ch., 48, 66, 68).

It has been held in the same case that a right to be acquired by 40 years' user under sec. 2 of the Prescription Act must also be an absolute right which is valid against all the world including the lessor or reversioner; and that before the expiration of the three years allowed to the lessor or reversioner, *no right* is acquired even against the tenant. (Wheaton v. Maple, 1893, 3 Ch., 4; note 7, p. 368, and note 3, p. 372, *supra*). In British India, under Act XV of 1877, as well as Act V of 1882, in cases of light and air, as well as of other easements, the reversioner or remainderman may resist the claim within three years, next after the determination of the interest of the tenant of the servient heritage. (See sec. 27, Act XV of 1877; sec. 16, Act V of 1882). Section 28, Act IX of 1871, excepted rights to light and air from the operation of this rule. In this respect, Act IX was similar to the English Statute. See pp. 428, 438, *infra*.

Claim by tenant *against* his own landlord.

Where a plaintiff alleged that he, as the tenant in the occupation of his holding, had by user obtained a right of way against his landlords, over their adjoining land, it was held that, such a right could not possibly have been acquired. Such right could only have been acquired, if at all, in respect of the holding occupied by the plaintiff. That holding was the landlord's tenement or heritage, and they, the landlords, were in possession of it, through their tenant, the plaintiff; and the landlords could not acquire a right of easement against themselves. The tenant could have claimed a right against a third person for or on behalf of his landlords; but the plaintiff in this case claimed this right adversely

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by the owner or occupier of the servient heritage) is still recognized by the English Law, as well as by Act V of 1882. (Goddard, 4th Ed., p. 128; Act V of 1882, secs. 8, 12 and 37). But no easement can be acquired by twenty years' user under sec. 2 of the English Statute unless such acquisition be (as at common law) good as against the *whole* world. Where, therefore, a right of way was enjoyed for twenty years by one tenant against another tenant of the same landlord, it was held that no easement was acquired against anybody. (*Bright* v. *Walker*, 1 C. M. & R., 211). As the owner in fee is incapable of resisting the enjoyment during the continuance of the tenancy, there can be no presumption of a grant by him, and the easement not being good as against him, is not good as against anybody. But the acquisition of rights to light by twenty years' user under sec. 3 of the Statute, does not require the presumption of any grant to support it, and such rights so acquired against a tenant of the servient heritage are acquired also against (his landlord) the owner of the reversion. (*Simper* v. *Foley*, 2 J. & H., 555; *Frewen* v. *Phillips*, 11 C. B., N. S., 419). The presumption of a grant is also not necessary to the acquisition of easements by forty years' user under sec. 2, and it has been held in Ireland that one tenant may acquire an easement of way by such user against another tenant of the same landlord. But by reason of sec. 8,[3a] an easement so acquired cannot be an easement in fee, or a fee-simple easement. If recognized by the Prescription Act, it may be called a base or qualified easement, or a right in the nature of an easement. (33 Ch. D., p. 252; I. L. R., 2 Mad., p. 51). An easement so enjoyed for forty years by one tenant against another tenant of the same landlord becomes absolute and indefeasible, and annexed to the fee-simple estate, if the reversioner, *i.e.*, the landlord, does not resist the user within three years of the expiry of the tenancy. (*Harris* v. *De Pinna*, 33 Ch. D., at pp. 252, 253). The English statutory law of prescription relating to the acquisition of easements (other than rights to light) by forty years' user, being the prototype of the Indian Law of positive prescription, a tenant here may, if the Irish ruling be followed, acquire against another tenant of the same landlord, any easement by twenty years' user.

Acquisition by and against tenants under the English Statute.

20 years' user of light.

40 years' user of ways.

Base or qualified prescriptive rights in Ireland.

Acquisition by and against tenants in British India.

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to them, although for the benefit of their property. A tenant or occupier of land cannot acquire, for his own benefit, a right of easement under Act XV of 1877, or Act V of 1882, and no tenant can acquire, by prescription, an easement against his own landlord. (Udit Singh *v.* Kashi Ram, I. L. R., 14 All., 185, F. B.; Warburn *v.* Park, 2 H. and N., 64, 69; Gayford *v.* Moffat, L. R., 4 Ch. Ap., 133). A tenant may, however, acquire against his landlord, any easement by express grant, or an easement of necessity by implied grant. (*Ibid.*)

[3a] This corresponds to sec. 27, Act XV, and sec. 16, Act V of 1882.

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And such user would give an absolute right against all the world except the landlord. And a qualified easement so acquired by twenty years' user against a tenant of the servient heritage would become absolute and indefeasible, if the landlord did not resist the claim within three years of the determination of the tenancy. (See sec. 27 of Act XV of 1877 or sec. 16 of Act V of 1882). But it has been recently held by the Court of Appeal in England that the expression "absolute and indefeasible" as applied to easements of all kinds, shews that when an easement is acquired under the statute, it imposes a burden for ever on the servient heritage; that the statute does not recognise qualified or terminable easements, or easements valid as to some persons and invalid as to others; and that before the expiry of the three years allowed to the lessor, no right is acquired by forty years' user even as against the tenant. (*Wheaton* v. *Maple*, 1893, 3 Ch., 48, at pp. 65, 66, 68). See also pp. 368, 372, *supra*.

Ruling of Court of Appeal. Prescriptive rights, not qualified or terminable.

Occupiers cannot acquire prescriptive easements for themselves independently of the owner.

The statutory law of prescription, whether English or Indian, does not enable an occupier to acquire an easement for himself, independently of the owner, so that an easement acquired under the rule shall expire with the occupier's interest in a dominant tenement. Such easement can only be acquired, if at all, in respect of the heritage occupied by the claimants, (Goddard, 4th Ed., p. 203; *Udit* v. *Kashi*, I. L. R., 14 All., 185, at p. 187).

What constitutes enjoyment.

The physical possibility of exercising or enjoying an easement, coupled with the determination to exercise and enjoy it on one's own behalf, constitutes *quasi*-possession or enjoyment.* Where an easement has once been actually enjoyed as of right, such enjoyment continues, if the physical possibility of enjoyment and the mental determination to enjoy are not wanting. According to Explanation 1, sec. 15, Act V of 1882, enjoyment in pursuance of a written or oral agreement with the alleged servient owner is no enjoyment within the meaning of the section, unless such agreement amounts to an absolute grant of an indefeasible easement.

Rights to light.

In cases of rights to light, no actual user and occupation of the light need be shown; the existence of a definite and constant aperture, opened or intended for the admission of light by which the light might have been used at any time, is sufficient. (Gale, 6th Ed., p. 291). In a recent case (*Cooper* v. *Straker*, 40 Ch. D., 21), it has been held that, proof of the existence for twenty years, of windows with moveable shutters, so constructed that they might be opened or closed at the pleasure of the owner, throws the *onus* on the other side to prove that the right has not been acquired.

Moveable shutters.

Onus.

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* Markby, 3rd Ed., sec. 577.

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Unoccupied buildings.

It is not necessary that the house or building should be inhabited or occupied by any person in order that a right to light may be acquired under the statute or the Act. (*Courtauld* v. *Legh*, L. R., 4 Exch., 126; *Pranjiban Das* v. *Mayaram*, 1 Bom., 148). In the case of rights to light or air, sec. 26, Act XV of 1877, or in the case of rights to light, air or support, sec. 15, Act V of 1882, does not require that such rights should be "enjoyed by any person claiming title thereto."

Continuous enjoyment.

To prove continuous *quasi*-possession, it is not necessary to prove continuous actual user, any more than it is necessary to prove continuous bodily contact, in order to prove continuous possession of a corporeal thing.[5] The enjoyment continues so long as the claimant's assertion of a continuous right is not interfered with whenever he has occasion to use it.[6] (But compare the rules of extinctive prescription, *infra*).

Actual enjoyment for the *full* period not necessary.

An easement must be actually enjoyed for the full period prescribed, before a prescriptive right to it may be acquired under the English Statute. The Indian law omits the words "actually" and "full" from its rule for the acquisition of easements by prescription. It is true that illus. (*b*) of sec. 26, Act XV of 1877, seems to make "enjoyment" equivalent to "actual user;" but it has been held that the illustration cannot be allowed to control the ordinary sense of the word "enjoyment," which occurs in the section itself, and the Legislature appears to have adopted this interpretation in Act V of 1882.[7]

Mere claim without any actual enjoyment—not sufficient.

There must, however, be, at least, at the commencement of the prescriptive period, an *actual* enjoyment of the right. A mere *claim*, however, often repeated or long continued, and whether its validity has been questioned or not, will not (without actual enjoyment) suffice to establish a prescriptive right. (See Stephens' Commentaries, Bk. II, Pt. 1., ch. 23).

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[5] See Markby, sec. 377; Tudor's Leading Cases, p. 160; and Flight v. Thomas, 11 Ad. & Ell., 688.

[6] Koylas v. Puddo and Sonatun, I. L. R., 7 Calc., 132.

[7] The objectionable illustration does not appear under sec. 15 of Act V of 1882, which corresponds to sec. 26, Act XV of 1877. See I. L. R., 7 Calc., 132.

Actual obstruction in the last year, under the English Statute.

Even in England it has been held in some cases that *actual user* for the full period is not necessary. (Goddard on Easements, 2nd Ed., pp. 124, 130, 132). It has been held by the House of Lords (Flight v. Thomas, 8 Cl. & Fin., 231), that an enjoyment of light for 19¾ years is sufficient to establish the right, although the non-user for the last three months of the required period of twenty years is due to actual obstruction, and not to a voluntary *cessation* of user. The obstruction was not, and could not, be submitted to or acquiesced in for one year. In Rajrup Koer v. Abul Hossein, I. L. R., 6 Calc.,

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Proof of continuous enjoyment for the prescribed period.

Evidence of user, a little before, and again after, the prescriptive period had begun, may be ground for presuming user and enjoyment at the commencement of the prescriptive period.* During the whole of the statutory term, the user must be such as to raise the inference of an assertion of a continuous right to enjoyment. (*Hollins* v. *Verney*, 13 Q. B. D., 304, 315). How many times the right has been exercised during any part of the period is not

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Notice of intended obstruction, under the old law.

394, at p. 404, their Lordships of the Privy Council did not find it necessary to consider the doctrine laid down in Thomas v. Flight. But in Elliott v. Bhoobun, 19 W. R., 194, their Lordships held that, according to the English law, before the passing of the Prescription Act, the plaintiff was required to show an uninterrupted enjoyment of light for 20 years with the acquiescence of the defendant, and that such acquiescence was negatived by the facts that about six weeks before the expiry of the 20 years, the defendant gave notice of his intention to interfere with that enjoyment, and that three weeks before such expiry he commenced to build a wall with the manifest intention of obstructing the plaintiff's lights, although there was no actual obstruction of the lights until a few days after the expiration of the 20 years. The facts relied upon in this case did not constitute an interruption of the enjoyment in the technical sense in which the word is used in the English Prescription Act or the Indian Limitation Act.

What is continuous enjoyment for 20 years.

In the case of a discontinuous easement like a right of way, it cannot be necessary to prove an actual continuous user by day and by night for 20 years. But it is extremely difficult to say exactly what cessations of actual user are, and what are not, consistent with such an enjoyment for the period of 20 years as the statute requires to establish the right. If actual user before the commencement of the statutory period is proved, and user for 18 or 19 years next before the end of the required period is also proved, the mere fact of non-user for some time immediately after the commencement of the statutory period is not necessarily fatal. (Hollins v. Verney, 13 Q. B. D., 304, at pp. 310, 311). See notes 6, 8 and 10.

* Lawson v. Langley, 4 A. and E., 890; Carr v. Foster, 3 Q. B., 581, and Goddard, 131, 132. See last paragraph of note 7, *supra*.

User "all along" or "from before."

The finding of the Court as to the length of the period of enjoyment should be clear and distinct. It will not do to say that all along or for a long time the plaintiff has been accustomed to enjoy the right. (Moharanee Indurjeet v. Luchmee Koer, 14 W. R., 349, at p. 351). A user all along or from before does not necessarily prove a right. (Mooktaram v. Hurro Chunder, 7 W. R., 1). The use of the word 'formerly' (*shabec*) without any expression to indicate the length of time for which the right had been exercised is insufficient to prove legally a right of user. (Kristo v. Kristo, 12 W. R., 76). A finding that the easement was enjoyed all along is, at all events, not very clear; it is difficult upon such a finding to come to the conclusion that the easement has been enjoyed as required by sec. 27 of Act IX of 1871. (Subramanya v. Ram Chandra, I. L. R., 1 Mad., 335, at p. 339). On the other hand, it has been held that where a lower appellate Court finds a right of user to have been proved, its decision cannot be interfered with, even though not very distinct as to the period for which such right has been enjoyed. In this case the enjoyment was found to have existed from long since. (Wuzurooddeen

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material if the claimant exercised it as often as he chose.[9] The enjoyment of the right may continue to the end of the prescriptive period, that is, till within two years before suit, although there has been no actual user or exercise of the right at the end of the period.[10] Some discontinuous or intermittent easements, by their very nature, necessitate long intervals between the acts of the actual user.[1] *A's* right of passage for boats over *B's* land, when it becomes covered with water during the rainy season, can only be exercised during two or three months of the year, and if there be a lack of

Continuous enjoyment.

Intermittent easements.

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v. Sheobund, 11 W. R., 285). So again the term *burabur* in respect to user has been construed to mean all along or always, certainly for more than the prescriptive period. (Kartick *v.* Kartick, 11 W. R., 522). With the exception of the Madras case, all the cases referred to in this note were decided before Act IX of 1871 came into force.

[9] Carr *v.* Foster, 3 Q. B., 581, 587 ; Tudor's Leading Cases, p. 190. But see latter part of note 1, *infra*.

[10] Koylas *v.* Sonatun, I. L. R., 7 Calc., 132 ; 8 C. L. R., 281, 283. In Hollins *v.* Verney (13 Q. B. D., 304, at p. 313), Brett., M. R., Lindley and Bowen, L. JJ., say : "We are not prepared to say that an actual enjoyment for the full period required by the statute may not be inferred, although there is no proof of actual user in every year." The Master of the Rolls and the Lords Justices were further of opinion that a voluntary cessation of user or mere non-user for more than a year at the beginning or end or in the middle of the statutory period, is not fatal, if the non-user is capable of explanation consistently with continued enjoyment of the right. The Court unanimously held that no enjoyment can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough, at any rate, to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognized, and if resistance to it is intended. *Ibid.*, pp. 311, 315.

Non-user at intervals not necessarily fatal.

Test or criterion of continuity.

[1] See Phear on Rights of Water, 97.

It may be here observed that, in the opinion of Parke, B., in Lowe *v.* Carpenter, 6 Exch., 825, the English Statute cannot apply where the rights are used at intervals of more than one year, for in such cases a party could not acquiesce in an interruption for one year. The words "actual enjoyment for the full period of twenty years" in the Statute, the form of plea under the Statute, and the explanation of "interruption" of enjoyment, induced Parke, B., to incline to the opinion that there must be actual user, at least once every year. (The last only of the three reasons may apply to the Indian law on the subject). The Court of Appeal in Hollins *v.* Verney (13 Q. B. D., 304) were of a different opinion. But it was nevertheless held in that case, where a right of way had been exercised for a period over 30 years, on three occasions at intervals of 12 or 15 years, the person claiming the right not having required to exercise it on any other occasion, that user confined to such rare occasions could not (in the absence of other evidence) be treated as the assertion of a continuous right to enjoy as is required by the Statute.

User at intervals of 12 or 15 years not sufficient.

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Intermittent easements.

rain, it is probable that, even for twenty or twenty-one months, the right may not be exercised at all.[2] Again, as ponds are not cleared every year, there must be long intervals between the acts of exercising an easement, of putting the soil of one's pond on another's land when the pond is cleared.[2a] So the right of carrying marriage and funeral processions over a neighbour's land cannot be exercised every year, unless marriages and deaths in the family of the claimant take place every year. But it has been held in England that a right which the claimant has occasion to exercise only once in fifteen years cannot ordinarily be acquired by user for the prescriptive period under sec. 2 of the Statute.[3]

15 years' intermission too long.

Cessation, suspension, discontinuance, and abandonment of user.

A cessation of user occasioned by the accident of a dry season, or other causes over which the claimant has no control, does not cause a breach in the continuity of the enjoyment.[4] A cessation of user of an easement of grazing one's cattle on another's heritage, caused by the dominant owner not having any cattle for two or three years, does not amount to a discontinuance of the enjoyment of the right.[5] Where the cessation of user is incapable of explanation consistently with continued enjoyment of the right, it amounts to a discontinuance.

Discontinuance.

Suspension.

Suspension of user, by contract between the dominant and servient owners, as, for instance, the temporary substitution by agreement of another way for that to which the

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[2] Koylas *v.* Sonatun, I. L. R., 7 Calc., 132 ; 8 C. L. R., 281, 284 ; Oomer Shah *v.* Rumzan, 10 W. R., 363.

[2a] Phear, 97.

[3] See Hollins *v.* Verney, 13 Q. B. D., 304. See note 1, *suprà*.

[4] Hall *v.* Swift, 4 Being. N. C., 381 ; Goddard, 158.

Continuous user, consistent with cessation of actual user at intervals.

In estimating the duration of user, it often is no easy matter to say whether the acts have been such as, upon the whole, to constitute continuous user ; whether, in fact, the absence of acts at any time probably arises from an interruption of the *right*, or merely from an interruption of the *user*, the right still existing. In England, this must always be a question for the jury, and would depend upon whether the user were sufficiently frequent under the circumstances to be a natural exercise of the right claimed or seemed to have been rendered incomplete by some external interference. Phear, 97. See notes (10) and (1), *supra*.

[5] Carr *v.* Foster, 3 Q. B., 581 ; Goddard, 131 ; Shama Churn *v.* Tariny, I. L. R., 1 Calc., 422, 430. The owner of a house ceasing to use a way to it, because the house is for a time unoccupied, is another instance. But, under sec. 47 of Act V of 1882 (which relates to the extinction of rights already acquired) the circumstance that the easement could not be enjoyed does not convert actual non-user into a constructive enjoyment of the right.

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right is claimed, is (technically) neither a discontinuance nor an interruption.[6]

"Interruption" of enjoyment.

Mere non-user, for a time, of an easement, which the claimant might, if he pleased, enjoy during that time, but which, for some good reason, he does not care to enjoy, is not an interruption of the enjoyment.[7] There must be an adverse obstruction submitted to for one year after notice before the enjoyment could be said to be "interrupted" within the meaning of the law on this subject. The law requires an actual cessation of enjoyment caused by an obstruction by the act of some person other than the claimant himself.[8] And the obstruction must be submitted to, or acquiesced in, for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made.[9]

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[6] Explanation iii, sec. 15, Act V of 1882; Carr *v.* Foster, 3 Q. B., 581, 585; Goddard, 159. Under such circumstances the easement continues to be constructively enjoyed. Goddard, 159. But where a new way is substituted for an old one with the consent of the dominant owner, and the non-user of the original way is accompanied by acts which warrant the Court in inferring an intention to release it, the right to that way is extinguished. The non-user need not extend over any defined period. Raj Biharee *v.* Tara Parshad, 20 W. R., 188. Constructive enjoyment.

[7] Shama Churn *v.* Tariny, I. L. R., 1 Calc., 422, 430. Even in the case of the negative and continuous easement of light, occasionally pulling down the blinds of the window is no interruption to (or discontinuance of) continuous enjoyment. (Harris *v.* De Pinna, 33 Ch. D., 238, at p. 262). As to windows with moveable shutters, see p. 428, *supra*. Pulling down blinds of window.

An (apparently fluctuating) interruption of ancient lights caused by the piling up of empty packing cases by a tradesman, unless proved to have continued at a fixed height, for a full year, cannot amount to an interruption within the meaning of the Act. (Presland *v.* Bingham, 41 Ch. D., 268). Fluctuating obstruction.

[8] A mere voluntary act of the claimant, not amounting to a "discontinuance," is not sufficient to prevent the acquisition of a prescriptive right. (Shama Churn *v.* Tariny, I. L. R., 1 Calc., 422). The "abandonment" of a right already acquired corresponds to the "discontinuance" of a right in the course of acquisition. The term "discontinuance," in the explanation under sec. 26, Act XV of 1877, is inaccurately used. It means a cessation of user, and not discontinuance in the legal sense of the term. See the remarks of Garth, C. J., in Shama Churn *v.* Tariny, I. L. R., 9 Calc., 422, and Expl. II, sec. 15, Act V of 1882. Discontinuance and abandonment.

The obstructive act may be committed by the servient owner or by a stranger, *e.g.*, a trespasser on the servient heritage. Davies *v.* Williams, 16 Q. B., 546; Goddard, 3rd Ed., p. 238. Obstruction by a stranger.

By the Civil law, and probably under the English law, the servient owner is liable, if he plants trees on his own land, and allows them to grow so as to obstruct the enjoyment of an easement by his neighbour. See Gale, 6th Ed., 494. Obstruction by trees.

If the user is interrupted so far as a part only of the servient heritage is concerned, the interruption only affects the acquisition of the right as to that part. Davies *v.* Williams, 16 Q. B., 546; Goddard, 3rd Ed., p. 236. Partial interruption.

[9] Sec. 26, Act XV of 1877; sec. 15, Act V of 1882. It has been held in England that an interruption occurring after an enjoyment of

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Protests against interruption of user.

The existence of the physical obstruction, of itself, is not sufficient notice, as it does not show by whom or by whose authority the obstruction is put up.[10] In order to negative submission or acquiescence, in a case where the obstruction cannot be summarily removed, it is enough if the claimant communicates, in a reasonable manner, to the party causing the obstruction that he does not really submit, to or acquiesce in it.[1]

Effect of repeated adverse obstructions, and of a voluntary discontinuance.

Repeated interruptions in fact caused by adverse acts, though not continued, and submitted to, for one year, are good evidence to show that the enjoyment was not peaceable.[2] A voluntary discontinuance of the enjoyment of a right, which is in course of acquisition by user, operates in the same way as an abandonment or permanent relinquishment of a right already acquired. After the discontinuance or abandonment, the right cannot be constructively

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Interruption for less than a year, at the end.

more than nineteen years and nine months, and lasting for about three months, will not prevent the acquisition of a right at the end of the twenty years. Thomas *v.* Flight, 8 Cl. and Fin., 231. See note 7, p. 429, *supra*. The same rule will probably apply in British India. After the twenty years, an interruption may last for nearly two years in this country without destroying the right.

[10] Seddon *v.* Bank of Bolton, 19 Ch. Div. 462.

Protests against *interruptions*.

[1] Glover *v.* Coleman, L. R., 10 C. P., 108; Tudor, p. 186. See also Brauson's Digest of Unreported Judgments of the Bombay High Court, p. 89. The claimant must do something which shows that he is "not satisfied to submit." It is not necessary to take active steps to remove the obstruction or bring an action within the year. The fact whether the claimant has submitted to or acquiesced in the obstruction must be determined with reference to the circumstances of each case. Where the obstruction cannot be summarily removed, a protest may be sufficient, but the claimant cannot, by mere fruitless protests, defer the bringing of an action for an unreasonable time.

Resistance or acquiescence by *some* of a body of persons.

Resistance of the interruption by some of a body of persons claiming the right is sufficient. (Subramania *v.* Ramchunder, I. L. R., 1 Mad., 339). Acquiescence by some members only of a body of persons who claim a right by prescription under the Act is not such an acquiescence in the obstruction as will defeat the claim. Warwick *v.* Queen's College, L. R., 10 Eq., 105. See Gale, 5th Ed., pp. 175, 178; Goddard, 3rd Ed., p. 239.

Protest against *user* under the old law.

According to the English law, before the passing of the Prescription Act, a right to light could be acquired by twenty years' uninterrupted user with the acquiescence of the servient owner. (Elliott *v.* Bhoobun, 19 W. R., 194, P. C.) Such acquiescence might be disproved by a protest or notice served by the servient owner at the time when the erection of the dominant house was commenced, and continued from time to time. (Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, at p. 54), or by commencing to build on the servient tenement, before the expiry of the twenty years, with the manifest intention of obstructing the light, although the light was not actually obstructed until after the expiry of the twenty years. (Elliott *v.* Bhoobun, 19 W. R., 194, P. C.) See note 7, pp. 429, 430, *supra*.

[2] Eaton *v.* Swansea Waterworks Company, 17 Q. B., 267.

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enjoyed.' The want of the determination to exercise or enjoy the easement puts an end to the enjoyment which would otherwise have continued. If the dominant owner bricks up a doorway, or substitutes a blank wall for a wall in which there is a window, he renders it physically impossible to exercise his right of way or his right to light through the door or window; and if the obstruction is allowed to continue for a considerable period, the enjoyment, in the absence of other evidence, may be presumed to have been discontinued or abandoned. Such voluntary discontinuance of user, though not an interruption within the meaning of sec. 26 of Act XV of 1877, or sec. 15 of Act V of 1882, prevents the acquisition of the easement. A person who incapacitates himself by his own act from any possible use or enjoyment of the easement, cannot be said to enjoy the easement openly, claiming a right thereto.[4] He cannot, for this reason, acquire a right by prescription, unless, indeed, he resumes the enjoyment, and continues to enjoy for a fresh period of twenty years.

Voluntary "discontinuance" like an "interruption" prevents acquisition.

Interruptions in the enjoyment of an easement as such by reason of unity of possession, at any time during the twenty years, though not interruptions within the meaning of the Acts, break the continuity of the requisite enjoyment, and according to some authorities destroy altogether the effect of the previous user.[5] Interruptions in the enjoyment

Effect of interruptions in enjoyment *as an easement* and *as of right.*

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[3] See Shama Churn *v.* Tariny, I. L. R., 1 Calc., 422, 429. The continuity of user, which is to establish a right by prescription, is broken by discontinuance. (*Ibid.*) Mere cessation of user or non-user may be explained consistently with continued (constructive) enjoyment of the right. (Hollins *v.* Verney, 13 Q. B D., 304). The three kinds of interruptions, in the ordinary sense of the term, (see p. 405, note 3, *supra*), break the continuity of enjoyment. In the technical sense, all "interruptions" are interruptions in fact, and something more. Periods of enjoyment separated by "interruptions" in the technical sense can *not* be added together to make up the 20 years. See note 5, *infra.*

[4] See Shama Churn *v.* Tariny, I. L. R., 1 Calc., 422, 430.

[5] Onley *v.* Gardiner; Gale, 215. But in a case of a right to *light* (Ladyman *v.* Grave, L. R., 6 Ch. App., 763), two different periods of enjoyment, disconnected by unity of possession in the interval, were allowed to be added together to make up the twenty years next before some suit, as required by the English law. See Gale, 5th Ed., p. 172. Although light need not, to satisfy the English statute, be enjoyed 'as of right,' yet it must, like *other* easements, be enjoyed in the character of an easement. (Goddard, 3rd Ed., p. 263). This case is, therefore, an authority for holding that an interruption in the enjoyment *as an easement*, though it breaks the continuity of valid enjoyment, does *not destroy* the effect of the previous user. And the remarks of the Court of Appeal in Hollins *v.* Verney (13 Q. B. D., 304, at pp. 312, 313) also go to show that, in the case of *any* easement, a temporary cessation of user *as an easement* should not be more fatal to the acquisition of the right, than a total

Computation in cases of unity of possession.

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of an easement as of right (except in the case of light, air or support under Act V of 1882) by reason of the claimant asking the leave or permission of the servient owner during the twenty years, also break the continuity of the requisite enjoyment.[1] In these cases, although there is no interruption in the enjoyment in fact by an adverse obstruction, the claimant can hardly be said to have enjoyed the right as an easement or as of right, for the period of twenty years ending within two years *next before* the suit.[2]

Computation of the prescriptive period.

An enjoyment next before *some* action or suit, in which the claim is brought into question, confers a right (under 2 and 3 Will. IV, c. 71), which may, in England, be set up in every subsequent action or suit.[3] But in British India, in every suit wherein the claim is contested, the period of enjoyment is to be computed with reference to that particular suit, except, of course, where the servient owner is estopped, by a former judgment, from effectually contesting the claim.

Beginning of the period.

The prescriptive period of twenty years may begin with the first act of enjoyment, except in the case of an easement to pollute the water of a private river, tank, &c. The enjoyment of this particular easement, so long as the servient heritage is not perceptibly prejudiced by it, is not to be taken into account. The period begins to run when the pollution first becomes perceptibly prejudicial to the riparian or other servient owner.[4]

Break in the continuity of enjoyment.

temporary cessation of user in fact. There is this difference, however, between the two cases, *viz.*, that a cessation of user in fact may be explained consistently with *continued* (constructive) enjoyment of the right; but a cessation of user as an easement must *break* the continuity of enjoyment. The period of such cessation (*if* it does not destroy the effect of the previous user) *must be excluded* in the computation of the period of twenty years. But cessation in the other case, does not cause any break in the continuity of valid enjoyment, and the period of the constructive enjoyment is *not excluded* in the computation. See pp. 419, 420, notes, *supra*. "Interruptions" *in fact*, in the technical sense in which the term is used in sec. 26, Act XV, sec. 15, Act V, and sec. 4 of the English Prescription Act, destroys the effect of the previous user. Periods of enjoyment separated by *such* interruptions cannot be added together to make up the twenty years.

[1] Onley *v.* Gardiner, 4 M. & W., 496. But in Hollins *v.* Verney (13 Q. B. D., at p. 313), the Court of Appeal, referring to unity of possession, i.e., the fact of the dominant and servient tenements being occupied together, say: "Why a temporary cessation of user as of right should be more fatal to the acquisition of the right than total temporary cessation of user, it is not easy to say." See note 1, p. 437, *infra*.

[2] Unless, indeed, the period of enjoyment may legally be extended back to a time which is more than twenty and two years before the suit and two disconnected periods are allowed to be added together.

[3] Cooper *v.* Hubbuck (12 C. B., N. S., 456, Williams, J., dis.); Gale, 6th Ed., p. 181; Goddard, 4th Ed., p. 205.

[4] Pollution of water, at first slight and imperceptible, often gradually increases by reason of the increase of the dominant manufactory, or

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In computing the period of twenty years, the time during which the servient owner has been under a disability is not excluded.[1a] *

No proviso for infants, &c.

But, under sec. 27, Act XV of 1877, and sec. 16, Act V of 1882, if the servient heritage has not been in the possession of the full owner, but has been under a lease for a term exceeding three years, or has been subject to an interest for life, the time during which such lease or interest has continued, is conditionally excluded from the computation of the period, that is, provided the person entitled to the servient heritage on the determination of such term or interest resists the claim within three years next after such determination. Under this provision two periods of valid enjoyment, separated by a period of invalid enjoyment, may be tacked together to make up the required enjoyment for twenty years. The period of continuous enjoyment, partly valid and partly invalid, may, in this case, at least, extend back to a time which is more than (20 + 2) twenty-two years before the suit. And here the express provision of the law introduces an exception to the rule which requires a valid enjoyment for twenty years ending within two years *next before* the institution of the suit.[1]

Conditional exclusion in favor of reversioner of servient heritage.

Tacking allowed.

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town, which pours its sewage or other foul matter into the nearest brook or river. See Goldsmid *v.* Tunbridge Commissioners, L. R. 1 Ch. Ap., 349 ; Goddard, 3rd Ed., p. 309 ; and expl. iv, sec. 15, Act V of 1882.

There can be no prescription to make a *common* nuisance which is a prejudice to all people. There can be no prescription to send sewage into a *public* river. Gale, 484 (note). See note 7, p. 444, *infra*.

[1a] Arzan *v.* Rakhal, I. L. R., 10 Calc., 214. Cf. sec. 7 of Eng. Stat.

[1] Gale, 6th Ed., pp. 185-189 ; Tudor, 161 ; Goddard, 3rd Ed., pp. 207-209. For exceptions suggested by judicial rulings, see note (5), p. 435, *supra*.

It may be mentioned here that the corresponding section (sec. 28) of Act IX of 1871 (following sec. 8 of the English Statute) excepted easements of light and air from the operation of this rule of exclusion of the term of a lease in favor of the lessor or reversioner.

In the computation of the period of 20 years prescribed for the acquisition of easements (other than rights to light), sec. 7 of the English Statute expressly provides for the absolute exclusion of the period of infancy or other disability of persons interested in resisting prescriptive user and also of the time during which he was a tenant for life. In the computation of the forty years prescribed for the absolute acquisition of such easements, sec. 8 of the Statute provides for the conditional exclusion of the time during which the servient tenement was held under a term of life, or any term of years exceeding three years. It has been held in England by Lord Hatherley, Chancellor, in a case of a right to light (to which neither sec. 7 nor sec. 8 applies) that the time during which there has been unity of possession of the servient and dominant tenements, may be excluded in the computation of the period, and that a part of the period may precede the unity of possession, and the remaining part may follow it. (Ladyman

Sec. 7 of Eng. Stat.

Sec. 8 of Eng. Stat., or sec. 27, Act XV.

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Effect of the exclusion under sec. 27.

The effect of this provision is not simply to unite two discontinuous periods of valid enjoyment, absolutely excluding the time of the intermediate invalid enjoyment, but to extend the required period of continuous enjoyment by so long a time as the term or life-interest continues.[2] Where the lessor or reversioner of the servient heritage resists the claim within the time allowed, the claimant must show twenty years' valid enjoyment either wholly before the beginning of the term or life-interest, if such term or interest subsisted[2a] at the commencement of the two years next before the suit; or partly before and partly after, if such term or interest ended more than two years before the suit.[3] Evidence of user for fifteen years before the commencement of the term or life-estate, user during the term or life-estate, and user for five years after the term or life-estate, continuously down to within two years of the suit, would be sufficient to establish the right. But non-enjoyment during the term or life-estate would prevent the two periods of valid enjoyment from being tacked together. The time excluded from the computation is excluded for the benefit of the lessor or reversioner, and not for the benefit of the claimant. The latter must show valid enjoyment for twenty years, besides uninterrupted enjoyment during the time which has to be excluded.[4] Enjoyment for the full period of 20 years against a lessee of the *locus in quo*, does not confer any right even against the lessee. No right at all is acquired under the Act until the three years allowed to the lessof have already expired. (See Wheaton *v.* Maple, 1893, 3 Ch., 48, at pp. 66, 68 and 72).

Doctrine of presumption applies to Government.

Before the enactment of a law of prescription proper in British India, it was held by the Madras High Court (in *Tonnuswamy* v. *The Collector of Madura*, 5 Mad., 6) that the right to an easement acquired by long user was as valid against the Government as it was against a private owner of land. And there can be no doubt that the *presumption* of

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v. Grave, L. R., 6 Ch., 763). The Court of Appeal in Hollins v. Verney (13 Q. B. D., 304, at p. 313) expressed an opinion that, even in the case of other easements, unity of possession at any part of the twenty or forty years was not necessarily fatal. See note 5, p. 435, *supra*.

[2] *Per* Parke, B., in Onley *v.* Gardiner, 4 M. & W., 500. See pp. 419, 435, *supra*.

[2a] That is, determined *immediately* before the two years.

[3] See Goddard, 4th Ed., p. 214.

[4] See Clayton *v.* Corby, 2 Q. B., 813; Pye *v.* Mumford, 11 Q. B., 675; Gale, 185. Interruption by the termer or life-tenant, or any other person, even during the time which has to be excluded from the computation of the prescriptive period, prevents the acquisition of the right.

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a right arising from long enjoyment arises against the Government in the same way as it does against private individuals.[6]

Is the rule of statutory prescription applicable to Government.

The question whether an easement may be acquired *against* the Government in respect of property belonging to the Government, under a rule of *statutory* prescription when such rule does not expressly embrace the Government, has been answered in the *negative*, in the recent case of the *Secretary of State* v. *Mathurabhai*, I. L. R., 14 Bom., 212. In the English Statute of Prescription (2 & 3 Will. IV, c. 71), the Crown is named in secs. 1 and 2 (which relate to the acquisition of profits and easements in general), but is not named in sec. 3 (which relates to the particular easement of light), and it has been laid down that the Statute, being of the nature of a law of limitation, the Crown is not *prejudicially affected* by the provisions of sec. 3 of the Statute.[6]

Enactments *limiting* rights and interests are not to be construed to embrace the Sovereign or the Government unless named therein (Kent's Commentaries, Lecture 20; *Ganapat* v. *The Collector*, I. L. R., 1 Bom., 7). According to this rule of construction, sec. 26 of Act XV of 1877 is not applicable to the acquisition of easements in or upon, or in respect of, property belonging to Government. But the Calcutta High Court, in *Arzan* v. *Rakhal*, *assumed* that the section did apply[7] to such acquisition against the Government.[8] It is just possible that the framers of Act IX of 1871 and Act XV of 1877 took the same view of the matter. But now, the last paragraph of sec. 15, Act V of 1882, expressly provides that the *twenty* years' rule shall not apply where the *servient* heritage belongs to Government. In analogy to the law of limitation applicable to *suits* by Government, it is provided that the enjoyment of an easement must continue for

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[5] Goodtitle *v.* Baldwin, 11 East, 488; Banning, 252; Goodman *v.* Mayor of Saltash, 7 App. Cas., 633; Wheaton *v.* Maple, 1893, 3 Ch., 48, 56.

[6] 1 Brown, 243; *Doe d.* The Queen *v.* The Archbishop of York, 11 Q. B., 81. See also Perry *v.* Eames, 1891, 1 Ch., 658, and Wheaton, *v.* Maple, 1893, 3 Ch., 48, where it has been held that the Crown is not bound by sec. 3 of the English Prescription Act. The Crown, however, may take *advantage* of the provisions of such a law against a subject. (Banning, 2nd Ed., 274).

[7] I. L. R., 10 Calc., 214, 219. According to the Bombay High Court, sec. 26, Act XV of 1877, does *not* apply to the Crown (see I L. R., 14 Bom., 213). The Madras High Court would seem to be of the same opinion. Virese *v.* Fatayya, I. L. R., 8 Mad., 467.

[8] See p. 201, note 8, *supra*.

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sixty years before a right to it can be acquired *against* Government, by positive prescription under the Act.[9]

Prescription in British India does *not* imply a grant.

A right acquired under the *positive enactments* referred to above (like the right to light under 2 and 3 Will. IV, c. 71) is matter *juris positivi*, and does not require any presumption of a grant.[10] The theory of *presumed grants* is not recognized by either Act XV of 1877 or Act V of 1882.[1] The objection that the easement in a particular case was not or is not capable of being *granted* cannot, *per se*, prevent the acquisition of such easement by *statutory* prescription in British India. Property belonging to Ecclesiastical Commissioners or other persons who cannot alienate it or impose an easement upon it, may be subjected to an easement by prescription under the Acts.[2] The incapacity of the servient owner or occupier to grant an easement is no bar to the acquisition thereof by such prescription.

Servient owner's incapacity to grant no bar to acquisition by prescription.

The rule applies to negative as well as to affirmative easements.

Section 26 of Act XV is (expressly) applicable to affirmative, as well as to negative easements, and there is nothing in sec. 15, Act V of 1882, which restricts its application to affirmative easements only. The section applies to all easements, whether or not they are to be exercised upon or over the soil or surface of the servient heritage. There is no valid objection to the acquisition of a negative[3] easement

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[9] But there is no express provision in Act V of 1882 which precludes the Courts from *presuming* against the Government a *grant* from user for twenty or thirty years coupled with *other* circumstances. See Banning, 252; Goodtitle *v.* Baldwin, 11 East, 488.

Even where Act V of 1882 does not apply, a sixty years' user would seem to be necessary to the acquisition of an easement against Government. (Virese *v.* Fatayya, I. L. R., 8 Mad., 467).

[10] See Tapling *v.* Jones, 11 H. L. C., 290; Goddard, 125, 126, 172; 3rd Ed., pp. 194, 195, 214. See also p. 407, *supra*.

[1] See Report of the Select Committee, dated 6th July 1881, *India Gazette*, Part V, p. 1017; Arzan *v.* Rakhal, I. L. R., 10 Calc., 214.

[2] See Lemaitre *v.* Davis, 19 Ch. D., 281, and p. 417, *supra*.

[3] The English *Statute*, it is said, does not apply to negative easements other than the right to light. See Gale 169; 3 Exch., 557. The right to support is not a purely negative easement and is governed by the Statute. Lemaitre *v.* Davis, 19 Ch. D., 281. Easements connected with *air*, *ether* or *smoke* (not being rights exercised upon or over the *soil* or *surface* of the servient heritage), such as rights to pollute the air, make a noise or emit smoke to the annoyance of our neighbours, are, it is said, not easements within the meaning of the English Prescription Act. (Webb *v.* Bird; Sturges *v.* Bridgeman; Bryant *v.* Lefevre; Goddard, 3rd Ed., pp. 181-183, 186). See note 5, *infra*. Sec. 27, Act IX was, and sec. 26, Act XV is, *expressly* made applicable to all easements, whether affirmative or negative. Neither of those sections, nor sec. 15 of Act V of 1882, was or is confined to rights exercised upon or over the *soil* or *surface* of the servient heritage.

Rights not exercised upon the *surface* of servient heritage.

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by prescription under these Acts. Whether the inchoate enjoyment of such an easement, before it has matured into a right, is an actionable wrong, or not, does not affect the question, if it is capable of being physically interrupted by some erection, excavation, or other act done upon the servient heritage.

Interruption of enjoyment of easement need not be conveniently practicable.

It is not necessary that resistance to, or interruption of, the enjoyment of an easement should (as suggested by *Arkwright* v. *Gell*, 5 M. & W., 203, and other English cases) be conveniently practicable. The policy of the law in favor of possessory titles would be defeated, if the greater or less facility or difficulty, convenience or inconvenience,[4] of practically interrupting a particular easement, affected the question of its acquisition by prescription.[4] When the right claimed is too large and indefinite in its nature, and incapable of definite enjoyment, it may not be expedient to hold that such right may be acquired by prescription[5]; but the language of the Acts does not prevent its acquisition, so long as it is

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[4] See Lord Selborne's judgment in Angus *v.* Dalton, 6 App. Cas., 740, at pp. 796—799. But see the remarks of Lords Justices Fry and Bowen in Harris *v.* De Pinna, 33 Ch. D., 238, and of Mr. Goddard, at pp. 218, 220, 282, *et seq.*, 3rd Ed., and pp. 190, 226, 4th Ed. As the theory of presumed grants is not recognized in British India, there is less difficulty here in adopting Lord Selborne's opinion on this point.

[5] See 6 App. Cas., 740, at pp. 759, 798, 824, 841.

Five English cases of rights which cannot be established by prescription.

The following are some of the cases in which it has been held, in England, that certain rights cannot be acquired by prescription :—

Webb *v.* Bird, 10 C. B. (N. S.), 282. Claim to have free access for all the winds of heaven to the sails of a windmill. Such a right (as well as, the rights referred to in the next four cases) cannot also be claimed by an implied grant or covenant, or by the presumption of a lost grant.

Attorney-General *v.* Daughty, 2 Ves., Sen., 453. Claim to unobstructed prospect. (See 3 B. L. R., 18, and p. 382, *supra*).

Chasemore *v.* Richard, 7 H. L. C., 349. Claim to percolating water not passing in a definite channel. (Sec. 17, Act V of 1882 ; pp. 445, 446, *infra*).

Bryant *v.* Lefevre, 4 C. P. D., 172. Claim to free access of wind to and from a chimney for the egress of smoke.

Sturges *v.* Bridgeman, 11 Ch. D., 852. Claim to continue to make a noise in one's own house, and to set the air or ether in motion, so as to annoy a neighbour, when such noise did not cause annoyance to any neighbouring proprietor or occupier during the requisite period of enjoyment. As to the applicability or otherwise, of these cases to British India, see the next two pages.

In all these cases, the claim is too large and indefinite to be acquired by prescription. See note 6, *infra*. In the first, fourth, and fifth of these cases it was held that the English Prescription Act did not apply to the passage of *air* over the land of another, and that sec. 2 of that Act referred only to easements which might be exercised upon or over the surface of the servient heritage. (Goddard, 4th Ed., pp. 188, 189).

For four other cases, see note 4, p. 444, *infra*.

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But enjoyment must be *capable* of interruption.

capable of open enjoyment by the dominant owner, and the user is capable of being, anyhow, interrupted. It may be contended that the user of a right which is incapable of being interrupted by any physical obstruction on the servient heritage, and which is also incapable of being prevented by action, is, practically, user or enjoyment without interruption. But the interpretation which has been put upon the words "enjoyed without interruption" in the English Statute, is, that a thing which is *absolutely* incapable of interruption cannot be said to be "enjoyed without interruption."*

Physically, or, by action.

The enjoyment of light and air may be easily interrupted by hoardings, &c. The enjoyment of lateral support is also capable of being physically interrupted, and is, at least, theoretically actionable. The enjoyment of a right of way is preventible both physically and by action.

Making a noise.

If a man, by working certain machines in his own house, makes a noise, and sets the air or ether in motion, so as to interfere materially and unreasonably with the physical comfort of his neighbour, such neighbour can prevent the noise, only by suing out an injunction.*a If the adjoining lands are unoccupied, and no material damage is caused to any

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* See Webb *v.* Bird, 10 C. B. (N. S.), 282; Goddard, 119, 120; Sturges *v.* Bridgeman, 11 Ch. D., 852. As the enjoyment must be as of right, and without interruption for the period of 20 years, it follows that for the same period there must have been an opportunity of resistance and interruption. Upon this principle, it has been held that easements, the enjoyment of which cannot be prevented, cannot be acquired. (See Hollins *v.* Verney, 15 Q. B. D., 304, at p. 309). In all the five cases referred to in note 5, *supra*, the claim was too large and indefinite to be acquired by use, or to be capable of interruption. A

Right to *air*, *not* coming in a defined channel.

claim of a right to air, not as coming in a defined channel over a neighbour's land, but generally and indefinitely, passing over that land, cannot be acquired by prescription. The wind which blows over a wide expanse and from varying directions and in uncertain streams, is of such an indefinite nature that any claim of right to have it uninterrupted is too vague and extensive to be tolerated by the law, so that the ordinary right of the owners of adjoining lands to build on such lands remains unaffected, however long a windmill or a chimney may have received such wind. (See Goddard, 4th Ed., p. 42). As regards

Right to light, and prospect.

light that is an entirely different matter from air. Light, the principal light which we enjoy, comes to us in a direct line, in direct pencils, and the light which is thrown over a neighbour's land goes over a very short space indeed. The right to light can only impose a burden upon land very near the building to which it is appurtenant, while the right to prospect, if allowed, imposes a burden on a very large and indefinite area. (Harris *v.* De Pinna, L. R., 33 Ch. D., 238, at p. 259). The rights claimed in Webb *v.* Bird, and Chasemore *v.* Richards, were analogous to prospect in this, that they were vague and undefined and very extensive. A burden so indefinite and extensive, should not be allowed to be created, except by actual agreement. (See Lord Blackburn's judgment in Angus *v.* Dalton, 6 App. Cas., at p. 824). See note (6), p. 455, *infra*.

*a See Illus. (s), sec. 54, Act I of 1877.

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body by the noise, it is not preventible either physically or by action. If such adjoining lands are subsequently occupied, the previous enjoyment of the owner of the machines does not prevent the new occupiers from suing him for the nuisance.' But supposing the adjoining lands are occupied, and the occupiers neglect to prevent the making of the noise for twenty years, the owner of the machines may, it is apprehended, acquire by long enjoyment an easement of setting the ether in motion over the adjoining lands, to the discomfort of their owners and occupiers.

Making a noise.

The only easements which cannot be acquired by prescription under Act V of 1882, and presumably under Act XV of 1877, are the four classes of rights which are mentioned below[1]:—

Easements not acquirable by prescription.

1. Rights which would tend to the total destruction of the servient heritages, or of the subjects of the rights. In *Dyer* v. *Lady James Hay*,[2] the Lord Chancellor said that "neither by the law of Scotland, nor of England, can there be a prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected."[3]

1. Right destructive of servient heritage or of subject.

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[1] See Sturges *v.* Bridgeman, 11 Ch. D., 852. Mr. Goddard (in the 4th Ed. of his work, p. 190, note *t*) says: "Sturges *v.* Bridgeman has now settled that the right to make a noise cannot be acquired under the (English) Prescription Act; it is, therefore, very doubtful if it can be acquired at all except by some express agreement between the parties concerned." But the Indian Acts are (expressly) applicable to easements of *air*, and to all easements, affirmative or negative, and whether or not they are to be exercised upon or over the surface of the servient heritage.

Right to make a noise in England and in India.

If the noise caused is a public nuisance, no right can be gained (in England or in India) by continuing it. (Mumford *v.* Oxford Ry. Company, 1 H. and N., 34); p. 447, *infra*.

[2] See sec. 17, Act V of 1882. For other cases. See note 4, *infra*.

[3] Macq. H. L. Cas., 305. In this case, the claim was, in effect, of a right for all the Queen's subjects to use a close at all times for exercise and recreation. See Gale, 5th Ed., p. 4. The dictum, however, is very general.

[1] Goddard, 4th Ed., 337.

It has, however, been held in England that where a private easement is claimed by a determinate person or persons, the fact that the servient owner is deprived of all the benefit of his land, is not material, for such an easement is not incapable of being the subject of a grant. (Carlyon *v.* Lovering, 1 H. & N., 784; Goddard, 4th Ed., p. 222). See also Gale, 5th Ed., pp. 4 and 20, where it is pointed out that the dictum of the Lord Chancellor applies only to that class of cases in which claims in the nature of easements are set up on behalf of large bodies of persons). The theory of presumed grants, not being recognized in British India, the mere fact that the easement claimed might or might not have been granted, does not solve the question. But it may be observed that, a person who claims an indefinite power of

Easements claimed by individuals, and by large bodies.

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(Right destructive of servient heritage or subject).

A claim to a profit *à prendre in alieno solo*, in order to be valid, must be made with some limitation or restriction.[2] An indefinite claim to destroy the subject-matter (*e.g.*, by taking away minerals which are part of the soil, or destroying a fishery) cannot be supported in law.[3] The rule laid down in Act V of 1882 applies to all prescriptive easements and profits which tend to the destruction of the servient heritage or of the subject of the right. In *Joy Doorga* v. *Juggernath*,[4] Macpherson and Mookerjee, JJ., held that no length of time can give a party such a right as destroys all the ordinary uses of the servient property,—*e.g.*, a straggling right to the promiscuous use of a whole property for the purpose of driving cattle over it. According to Act V of 1882, if the exercise of the right is likely to be destructive of the servient property or of the subject of the right, it cannot be acquired by prescription. If the servient owner has actually granted such a right, he is, of course, bound by his grant.

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applying the land to all uses or purposes, claims a right of property, and not a mere easement. (See p. 347, *supra*).

[2] Tudor, 135 ; p. 349, *supra*, and note 8, p. 350, *supra*.

[3] See Goodman v. Mayor of Saltash, 7 App. Cas., 633, 646 ; and Phear, 81, 83. See pp. 349, 350, *supra*.

[4] 15 W. R., 295. See also M. Zumeer v. M. Doorgabun, 1 W. R., 230, where Kemp and Glover, JJ., held that the right claimed by prescription must not be so large as to extinguish or destroy all the ordinary uses or profits of the property. In Doorgachurn v. Kalikumar (8 C. L. R., 375; I. L. R., 7 Calc., 145), Sir Richard Garth, C. J., held that a

Right of way in *every* direction.

right of way in every direction over the defendant's land or water cannot be claimed by prescription. In order to acquire a right by prescription, the claimant must prove the exercise of the right of way in a particular direction. But in the case of the Wimbledon and Putney Commons Conservators v. Dixon (1 Ch. D., 362), where it appeared that the way in question passed over a common to a farm, where there was no definite road, but only a series of tracks in varying lines. Mellish, L. J., was of opinion that, if the terminus *a quo* and the terminus *ad quem* could be found, the mere fact that the dominant owner did not go precisely in the same track for the purpose of going from one place to the other would not enable the servient owner to dispute the right of road. (Goddard, 3 Ed., pp. 376, 377). Where the particular direction of a way has been a matter of uncertainty, and the owner of the servient heritage wishes to confine the dominant owner to a particular track, he must set out a reasonable way ; and then the latter is not entitled to go out of the way merely because the way is rough and there are ruts in it, and so forth. (*Ibid.*) Cf. pp. 456, 459, *infra*.

Other rights which are not acquirable.

Rights not acquirable according to judicial decisions : 1. Rights of way in every direction. (See above). 2. Rights to shade and shelter. (See p. 369, *supra*). 3. Private rights in derogation of existing public rights,—*e.g.*, private rights of way over an existing public road. (Reg. v. Chorley, 12 Q. B., 517). 4. Rights, the existence of which is contrary to an Act. (Rochdale v. Radcliffe, 18 Q. B., 287). See also note 5, p. 441, *supra*.

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2. Under clause 1 of sec. 26 of Act XV, and under clause 1 of sec. 15 of Act V, a right to unobstructed light or air can only be acquired for the benefit of buildings; and sec. 17 of Act V declares that a right to the free passage of light or air to an open space of ground cannot be acquired by prescription in any case. It has been held in England that such a right cannot be so acquired in respect of a timberyard and sawpit.*

2. Right to free passage of light or air to open space.

3 & 4. Every owner of land has a natural right to collect and dispose, within his own limits, of all water, on or under its surface, which does not pass in a defined channel.* Clauses (*c*) and (*d*) of sec. 17 of Act V enact, in accordance with the principle of the ruling in *Kena Mahomed* v. *Bohatoo Sircar*,† that a right to the uninterrupted flow of such waters cannot be acquired by a neighbouring proprietor by prescription. If surface water reaches and flows in some definite channel, or if it is permanently collected in a pool, tank or otherwise, then, and then only, may a right to such water be acquired by a neighbour by prescription. Similarly, a right to underground water, which does not pass in a defined channel, but merely percolates through the strata in unknown or continually varying channels, cannot be acquired by prescription. The owner of the land may divert such underground water, even if it had been allowed to percolate the soil, and to pass into the

3. Right to surface water not flowing in a stream, and not permanently collected.

4. Right to underground water not passing in a defined channel.

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* Goddard, 176; see also Potts *v.* Smith, L. R., 6 Eq., 311. There must be some window or other definite aperture to measure the enjoyment; and the right to light cannot be acquired for, or in respect of, a vacant piece of ground. Gale, 6th Ed., pp. 289, 290, 291. There may be a right to light coming through a tunnel, or through a building between two columns with a lateral bar placed on the top, as well as over a building, or over a vacant space. (See Myers *v.* Catheson, 43 Ch. D., 470).

Light through a tunnel.

* See Illus. (*g*), sec. 7, Act V of 1882. Surface water, being water of the rainfall passing in a defined channel by the operation of nature only, may be the subject of a prescriptive easement, although the stream is only intermittent. Perumal *v.* Ramsami, I. L. R., 11 Mad., 16. The reason why surface water not running in a stream or collected in a pool, tank or otherwise is not a subject of prescriptive right, is that there is no right of water in *alieno solo*, except to the extent that the right to the uninterrupted flow of a natural stream in its usual defined course is *jure naturæ*; and the reason why underground water not running in a defined stream is not a subject of prescription, is that there is no visible means of knowing, to what extent, if any at all, the supply to the plaintiff's tank would be affected by water percolating in and out of defendant's land." (*Ibid.*, I. L. R., 11 Mad., at p. 22). As to air passing in a defined channel, see notes, pp. 382, 386, 442, *supra*.

Surface and underground water.

† Marshall's Report, 506.

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claimant's well for twenty years and upwards.[8] But the owner of land has no such right to percolating water under the surface of his land as would prevent his neighbour from draining away the water by lawful operations on his own soil.[9]

Rights acquired by prescription are absolute and permanent. They are unconditonal and indefeasible.

The right to an easement acquired by prescription under Act XV of 1877, or Act V of 1882, whether acquired by an occupier or owner of the dominant heritage, becomes permanently appurtenant to such heritage as an absolute and indefeasible right.[10] If acquired by an occupier of such heritage, it is acquired on behalf of the owner,[1] and continues until it is abandoned or released by such owner or extinguished by operation of law.[2] Prescription under

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[8] Chasemore *v.* Richards, 7 H. L. Cas., 349. One of the reasons given for this decision was that the owner could not prevent or stop the percolation of water. But as percolating water may be diverted and appropriated by the owner, the use of it by another is *capable* of interruption. However, under the positive enactment of the Indian Legislature, it is unnecessary to consider the *reason* of the rule. Though the owner may divert or obstruct such water, he must not *pollute* it to the detriment of others. (Goddard, 4th Ed., 94).

[9] Acton *v.* Blundell, 12 Mees. and Wels., 324; Tudor, 196. There are streams which sink underground, pursue for a short space a subterraneous course, and then emerge again. Such underground water flows in a known and defined channel, and the rule as to percolating water does not apply to it. (Tudor, 197).

Under Act V they are *defeasible* in one sense.

[10] Sec. 26 of Act XV expressly says that the right acquired shall be absolute and indefeasible. Sec. 15, Act V, says, that the right shall be absolute. The Legislature did not, perhaps, intend to alter the law materially by the omission of the words "and indefeasible" from sec. 15. It is possible, however, that as sec. 43 of Act V renders the right defeasible by certain attempts to extend the user, the term "indefeasible" is omitted with the object of meeting Lord Westbury's argument in Tapling *v.* Jones, 11 H. L. C., 290. See Goddard, 2nd Ed., pp. 307, 308; 3rd Ed., pp. 430—432; p. 461, note 2, *infra*.

"Absolute and indefeasible."

"Absolute and indefeasible" means absolute and indefeasible against the whole world. An easement acquired by prescription imposes a burden *for ever* on the servient heritage. Neither the English Statute nor Act XV of 1877 contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons, invalid as to others. The easement acquired under the statute or the Act absolutely binds the fee in the land. (Wheaton *v.* Maple, 1893, 3 Ch., 48, at pp. 65, 68, 72). If the enjoyment or user under the statute or the Act, cannot give a valid title against *all* persons having estates or interest in the *locus in quo*, the statute or the Act gives no right at all, even against a lessee, during the continuance of his term. (*Ibid.*, p. 72). See p. 372, *supra*.

[1] See Goddard, 2nd Ed., p. 89; 3rd Ed., p. 126; sec. 12, Act V of 1882. See note 3, p. 425, *supra*.

Effect of a sale, for arrears of rent or revenue.

[2] Even a sale of the servient estate or tenure (free from encumbrances) for arrears of revenue or rent, does not, it is apprehended, extinguish a prescriptive easement. But the acquisition of land (absolutely and free from encumbrances) under the Land Acquisition Act, does, it

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these Acts gives a good title against all persons, including the owner of the servient heritage, even where such heritage was in the possession of a temporary tenant at the time of the acquisition, provided the owner did not avail himself of the special proviso in sec. 27 of Act XV, or sec. 16 of Act V.[3] A right when it has been completely acquired under these Acts being absolute, is not subject to any condition or qualification.[4] Enjoyment of an easement for the prescribed period under a grant imposing an easement, but subject to an express or implied condition, on the fulfilment of which it is to cease, does not confer an indefeasible right, and is therefore not valid under sec. 26 of Act XV, or sec. 15 of Act V. But where a right is acquired under these sections by a valid enjoyment for the prescribed period, the right is absolute and indefeasible.

Prescription legalizes previous user, if it did not amount to a *public* nuisance.

The inchoate enjoyment of an affirmative easement, before it ripens into an absolute right by prescription, gives the servient owner a right to sue for a series of trespasses; but as soon as the prescriptive right is acquired, the whole of the previous user is legalized from its commencement.[5] But no right can be gained by continuing a *public* nuisance. There can be no prescription to make a common nuisance, which is a prejudice to *all* pepole, because it cannot have a lawful origin.[6]

Effect of an acquisition under the Land Acquisition Act.

has been held, extinguish incorporeal rights of the nature of easements upon or over the land so acquired. (See Collector *v.* Nobin, 3 W. R., 27; *In re* Fenwick, 14 W. R., Cr., 72; Taylor *v.* Collector, I. L. R., 14 Calc., 423). Inchoate and accruing rights, as well as easements already acquired, are extinguished by the acquisition of the land under the Act. (See Barlow *v.* Ross, L. R., 24 Q. B. D., 381). It seems pretty clear that persons entitled to easements over the land so acquired are entitled to compensation under the Act. (Michell, p. 119; *In re* Tilbury Ry. Co., L. R., 24 Q. B. D., 40 and 336). As to the implied grant of easements necessary for the land so acquired or severed by such acquisition, see p. 393, *supra*. Easements expressly granted by the servient owner are extinguished by a sale for arrears of revenue or rent. See Illus. (*c*), sec. 37, Act V of 1882, and secs. 161 and 165 of the Bengal Tenancy Act, VIII of 1885.

[3] Tenants holding even under the same zemindar may impose easements in favor of each other by express grant. See Goddard, 3rd Ed., pp. 15—17; Statement of Objects and Reasons, *Ind. Gaz.*, 13th Nov. 1880, pp. 53—57, and p. 425, *supra*.

[4] See Lord Westbury's judgment in Tapling *v.* Jones, 11 H. Lds., 290; Gale, 607.

[5] Wright *v.* Williams, 1 M. & W., 77; Jogal Kishore *v.* Mulchand, 7 N. W. P., 293; p. 436, *supra*.

(*Private* nuisances legalized).

[6] Mumford *v.* Oxford (1 H. & N., 34); Fowler *v.* Sanders, Cro. Jac., 446; Gale, 5th Ed., p. 484. A private nuisance may be prescribed for. (Dewell *v.* Sanders, Cro. Jac., 490). Even when the nuisance is injurious to many proprietors, it may be prescribed for. (Crump *v.* Lambert, L. R., 3 Eq., 413; Gale, 485). The ruling in the case of

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When an easement has been acquired[r] by prescription, questions as to the extent of the easement frequently arise. The general rule is, that in the absence of evidence as to the purpose for which the right was acquired, the extent of the easement and the mode of its enjoyment must be determined by the accustomed user of the right.[s] The Court, however, is not bound to found its judgment entirely upon the actual user proved. It may, and should, take into consideration the surrounding circumstances connected with the actual user. If a way was used for the several purposes for which it was wanted during the prescriptive period, there may be a ground for inferring that there was a right of way for all purposes; but if the user was confined to one purpose, or to particular purposes only, the Court would not be justified in finding that the right extended to all purposes.[t] Though a carriageway may include a horseway, it does not necessarily include a drift way, the general rule

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Sreedhur v. Adoyto, 20 W. R., 237, that there can be no prescriptive right to injure another, even though such injury has the warrant of very ancient user, can hardly be good law. Throwing into the plaintiff's tank the burnt earth of which the defendant's crucibles were made was, in that case, only a *private* nuisance. (See Carlyon v. Lovering, 1 H. & N., 797, 800). See p. 436, note 9, *supra*.

[r] Goddard, 2nd Ed., pp. 221, 247; cl. (*e*), sec. 28, Act V of 1882.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed. Paragraph 2, sec. 28, Act V of 1882. Such a right of way is not a general right for all purposes, but is limited by the necessity existing at the time of the grant. The way must be suitable to the business of the grantee. (See Esubai v. Damodar, I. L. R., 16 Bom., 552, at pp. 558, 559; Gayford v. Moffat, L. R., 4 Ch., 133; Corporation of London v. Reggs, 13 Ch. D., 806).

The extent of any *other* easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired. In the absence of evidence as to such intention and purpose, the extent of a right to light or air imposed by actual grant, is the quantity of light or air that entered the window or other opening at the time when the grant was made. In the case of a grant by will, the quantity that entered the opening at the time the testator died is the proper measure of the right. (See sec. 28, Act V of 1882). See also Goddard, 4 Ed., p. 350.

[s] Cowling v. Higginson; Goddard, 248. "A servitude gained for one purpose cannot lawfully be used for another." (Jadulall v. Gopal Chandra, I. L. R., 13 Calc., 136, P. C.) "The right to navigate for recreation would no more confer a right to fish, than a right to enter on land to erect booths for a fair or for horse-races or for pastime and recreation (all rights recognized by law) would authorize milking the cattle or clipping the sheep or appropriating the game or rabbits found thereon." Per North, J., in Smith v. Audrews, 1891, 2 Ch., 678, at pp. 697-98. A right of way gained for the purpose of cleansing plaintiff's privy by his own mehters at long intervals of time, is not affected by the fact that the servants of the Municipality, under a new law, use the way for cleansing the privy every day. The purpose is still the same

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being that, in the absence of evidence of the purpose for which the right was acquired, a right of way of any one kind does not include a right of way of any other kind.*

(Who may use ways).

Where a right of way to and from a certain house has been acquired, it may be used not only by the dominant owner, but by the members of his family, his guests, lodgers, servants, workmen, visitors, and customers, for such user is necessary for the beneficial enjoyment of the house to which the right is appurtenant. So, if the house is let to a tenant, the tenant may use the way, and the owner also

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Purpose for which right is acquired.

and the servitude is not aggravated even in the sense of causing more annoyance to the defendant (I. L. R., 13 Calc., 136). A right of way to a field, acquired by prescription, can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place. (Williams *v.* James, L. R., 2 C. P., at p. 582 ; Goddard, 3rd Ed., p. 491). This rule, however, does not apply to the case of a prescriptive right to the passage of light or air. In such a case the *purpose* for which the easement was acquired is not taken into consideration in fixing its extent and mode of enjoyment. And it has been held that even an entire alteration of the purposes, and the character of a building, such as the conversion of a church into a warehouse, or of a house into a workshop, does not affect a prescriptive right to light, enjoyed with such building. (Scott *v.* Pape, 31 Ch. D., 554, at p. 569). It has been held that a way of necessity attached to a tenant's field, and used for one purpose, may be used for other purposes, if the field is *expressly* sold for carrying out those other purposes. (Serf *v.* Acton, 31 Ch. D., 679). See note 11, *infra*.

Case of light, or, air, exceptional.

Way of necessity.

Highways may be used for purposes of passing and repassing only.

The legitimate use of a highway is generally described as a "right of passage" or a "right of passing and repassing." The use of the soil of the highway for any *other purpose*, whether lawful or unlawful, is an infringement of the rights of the owner of the soil. (Per Lopez, L. J., in Harrison *v.* Duke of Rutland, 1893, 1 Q. B. 142, at p. 154). But things are done upon highways by every body which are recognized as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. (Per Lord Esher, M. R., *ibid.*, p. 146). If by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind. (Per Kay, L. J., *ibid.*, p. 156). The grass or trees growing on the sides of the highway are held to be the property of the owners of the soil. (*Ibid.*, p. 155). Depasturing cattle upon a highway may amount to a trespass on the soil of the highway. (*Ibid.*, 157). A person using the soil for any other purpose than as a highway, *e.g.*, being on such soil in pursuit of game is *primâ facie* a trespasser. (*Ibid.*, p. 157). The *purpose* of the person passing along the highway may make such passing a trespass. If a man goes along a highway for the purpose of cutting down the trees or bushes which grow along the side of it, or taking the grass, or setting up a show upon the highway or doing upon the highway itself any act lawful or unlawful, other than that of passing and repassing, he is a trespasser as against the owner of the soil. (*Ibid.*, p. 158).

Other allowable purposes.

Improper use of highways.

* Ballard *v.* Dyson ; Goddard, 249 ; sec. 28, Act V of 1882.

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may use it for the purpose of collecting the rent and seeing that the house is kept in repair.'[10]

Two special rules as to extent.

Two special rules are laid down by sec. 28, Act V of 1882, in respect of the right to the passage of light or air to an opening, and the right to pollute air or water.

1. Right to receive light or air.

The extent of the right to the free passage of light or air is that volume or quantity of light or air which has been accustomed to enter the window, door, or other opening (that is, the amount of light suffered to pass over the servient tenement to the opening in the dominant tenement) during the whole of the prescriptive period, irrespectively of the purposes for which it has been actually used.'[11]

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[10] Illus. (*b*), sec. 21, Act V of 1882. As to letting the house to a tenant, see also M Amjadee v. Syed Ahmed, 6 W. R., 314. The dominant owner or occupier and his licensees alone can use the way. (Goddard, 4th Ed., p. 380).

Least quantity of light.

[11] Sec. 28, Act V of 1882. If the size of the opening has been changed from time to time, and there has been a variation in the quantity of light accustomed to enter the opening, the least quantity accustomed to enter it during *any part* of the prescriptive period would, it is apprehended, be the quantity, which has been accustomed to enter that opening during the whole of the prescriptive period. (See Scott v. Pape, 31 Ch. D., at p. 572, and notes under sec. 26, Act XV of 1877, in the Appendix).

Doors.

A right to access of light or air to a door can be acquired, although the door is not used exclusively for the reception of air or light, but is also used for the ordinary purposes of a door. (Bottlewalla v. Bottlewalla, 8 Bom., 181, 190). As to windows generally closed with moveable shutters, and fluctuating obstructions, see pp. 428, 433, *supra*.

Purposes for which light has been used.

A variation in the mode of user, or of the purposes for which the light may have been actually used, is not material for determining the extent of the right. The servient owner may have been totally ignorant of the purpose for which the light was used after it had entered the house; and according to the more recent decisions, variation of the mode of user of light is not so material as an element for determining the extent of the right, as variation in the mode of user is in the case of *other* easements. (Goddard, 4th Ed., p. 347. See also the middle portion of note 8, *supra*). But it does not follow that the purposes for which the light has been actually used by the dominant owner should not be considered in finding whether an alleged disturbance is actionable or not. If the disturbance prevents the dominant owner from carrying on his accustomed business as beneficially as he had done previous to instituting the suit, he suffers substantial damage, and can sue for compensation or for an injunction. (See secs. 33 and 35, Act V of 1882). An injunction may also be sued for when a threatened or intended act of disturbance must (if performed) necessarily or inevitably disturb or violate the right. (Goddard, 3rd Ed., p. 400, and Act V, sec. 35, cl. 2). The Indian Act follows Lord Westbury's decision in Jackson v. The Duke of Newcastle (33 L. J. Ch., 698), and does not allow the Courts to consider the possible fact that substantial damage may be sustained at a future time if the premises are applied to a different purpose. (Sec. 33, Expl. 2). Mr. Goddard, however, shews that Lord Westbury's decision is opposed to the generally

Present purposes.

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But, in case of an interference, the claimant of a prescriptive easement of light or air cannot enforce a right to the whole volume or quantity, but only to so much as is reasonably

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accepted doctrine that "it is no answer to an action for an obstruction of light to say that sufficient light is left for the present purposes of the occupier of the house." (Goddard, 4th Ed., p. 460).

The remedy given by sec. 33, Act V of 1882, does not appear to be co-extensive with the right as defined in sec. 28 (Michell, 105). According to Mr. Gale, it is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement. The injury complained of, must be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved. (Gale, 6th Ed., p. 552). But sec. 32 of the Easements Act uses the term "disturbance" as applicable to every interference with the enjoyment of an easement. It appears, however, from secs. 33 and 35 of the Act, that every actual disturbance or interference is not actionable unless it has caused substantial damage to the plaintiff. An obstruction which causes a trifling diminution of the light which has been accustomed to enter a window during the prescriptive period, does not give a right to sue, either because the claimant is not (under the old law) entitled to the whole of the light which has been accustomed to enter his window (I. L. R., 14 Calc., 839, at p. 856), or because secs. 33 and 35 of the Easements Act expressly provide that an actual disturbance which does not cause substantial damage to the plaintiff is not actionable. In a case arising under the old English law, Sir Barnes Peacock held that it would be unreasonable to presume that the owner of the servient tenement intended to grant a right to the use of more light than was necessary for the comfortable and convenient habitation of the dwelling-house. All that may be reasonably presumed from the acquiescence of the servient owner is, that he shall not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation. (Bagram *v.* Khetternath, 3 B. L. R., O. C., 18, at p. 50). Although the right to light acquired by statutory prescription is not based on the presumption of a grant, the English Statute or the Indian Limitation Act, it has been held, does not enlarge the extent of the easement. The absolute and indefeasible right, given by the Statute or the Act, is not greater than the extent of the right to light before the Statute, or the Act. (Kelk *v.* Pearson, L. R., 6 Ch., 809; Delhi and L. Bank *v.* Hem Lall, I. L. R., 14 Cal., 839).

Actionable disturbance.

Extent of right, not enlarged by Act.

A trifling obstruction of an easement, if made to put the right to a test, or if it is calculated by repetition to establish an adverse right, may be "likely to injure the plaintiff by affecting the evidence of the easement," and may therefore amount to "substantial damage," for which an action would be maintainable. (Goddard, 4th Ed., p. 405).

Slight disturbance when actionable.

As a general rule, an action will lie against a person who creates a disturbance, as well as against one who continues it, provided he can, but refuses to, prevent its continuance. (Goddard, 4th Ed., p. 480).

Who may sue and be sued.

The occupier or the party in possession of the dominant heritage may sue for a substantial interference with the enjoyment of an easement, even though such interference be of a *temporary* nature only. The reversioner, or the person entitled to an interest in the future, may also have an action for the same disturbance if it is of a *permanent* nature and injurious to his interest. (See Gale, 5th Ed., p. 649).

Suit by occupier or reversioner.

When and why may reversioner sue.

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necessary. In the case of light, he is (for all practical purposes) entitled to so much of the quantity as is necessary for his physical comfort or for carrying on his accustomed business.

The ground of an action by the reversioner is, that the evidence of his right to the easement is affected, as his acquiescence in the obstruction would furnish evidence against him of a renunciation and abandonment of it. (Bower *v.* Hill, 1 Bing. N. C., 549). If the value of the reversionary interest in a house is so diminished by the obstruction that it would sell for a smaller sum than it would have sold if there had been no such obstruction, an action will lie at the suit of the reversioner. (Jesser *v.* Gifford, 30 L. J. C. P., p. 281). The doing of any act (of disturbance) likely to injure the plaintiff (whether occupier or reversioner) by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage is such "substantial damage" as would make the disturbance actionable. (Sec. 33, Expl. 1, Act V of 1882). Several proprietors may join in a suit to restrain a nuisance which affects their properties. (Umfrevilli *v.* Johnson, L. R., 10 Ch., 380).

No court can (in lieu of a prohibitory injunction) award damages by way of compensation for an injury not yet committed, but only threatened and intended. (43 Ch. D., 316). But cf. Martin *v.* Price, 1894, 1 Ch., 276, at p. 284.

Injunction when granted.

The Courts in British India cannot grant an injunction where pecuniary compensation affords adequate relief. (Sec. 54, Act I of 1877). A very slight or trifling diminution of light does not entitle the plaintiff even to pecuniary compensation. (Delhi and London Bank *v.* Hem Lall, I. L. R., 14 Calc., 839). A large or considerable diminution of light gives him the right to sue for compensation, but he is not, even then, *necessarily* entitled to an injunction. If the plaintiff's property might still remain his and be as substantially useful to him as before, if it is not rendered substantially useless to him, the Courts here will ordinarily refuse to grant an injunction. (Dunjibhoy *v.* Lisboa, I. L. R., 13 Bom., 252 ; Kadarbhai *v* Rahimbhai, *ibid.*, p. 674). If the defendant's act would virtually compel the plaintiff to sell his property out and out to the defendant, it would be the *duty* of the Court, to issue an injunction ; but where the injury is less serious, the Court will exercise its *discretion*. (Holland *v.* Worley, 26 Ch. D., 578 ; 1894, 1 Ch., p. 280).

Prohibitory and mandatory injunctions.

A prohibitory injunction restraining the defendant from proceeding with an intended building is more easily obtainable than a mandatory injunction ordering him to pull down a completed building, specially if it is a costly one. (Benode Coomaree *v.* Shudaminey, I. L. R., 16 Calc., 252). A mandatory injunction, in effect, directs that things should be restored to their former condition. (Brett, 2nd Ed., 357). A mere notice not to continue a building so as to obstruct the plaintiff's rights, is not, when not (as soon as practicable) followed by legal proceedings, a sufficiently special circumstance for granting a mandatory injunction. (*Ibid.*) In Kadarbhai *v.* Rohimbhai, a prohibitory injunction restraining the defendant from erecting an intended building was granted, because it was proved that the building, if completed, would shut out the light so as to render the room completely dark. A mandatory injunction was also issued for the removal of a wall which had been raised by the defendants, after the Lower Court's decree in their favor, and pending the plaintiff's appeal to the High Court (I. L. R., 13 Bom., 674). In Damil *v.* Ferguson, after service of writ or summons, the defendant hurried on with his buildings in the hope that when once up, the Court might decline to order them to be pulled down. The

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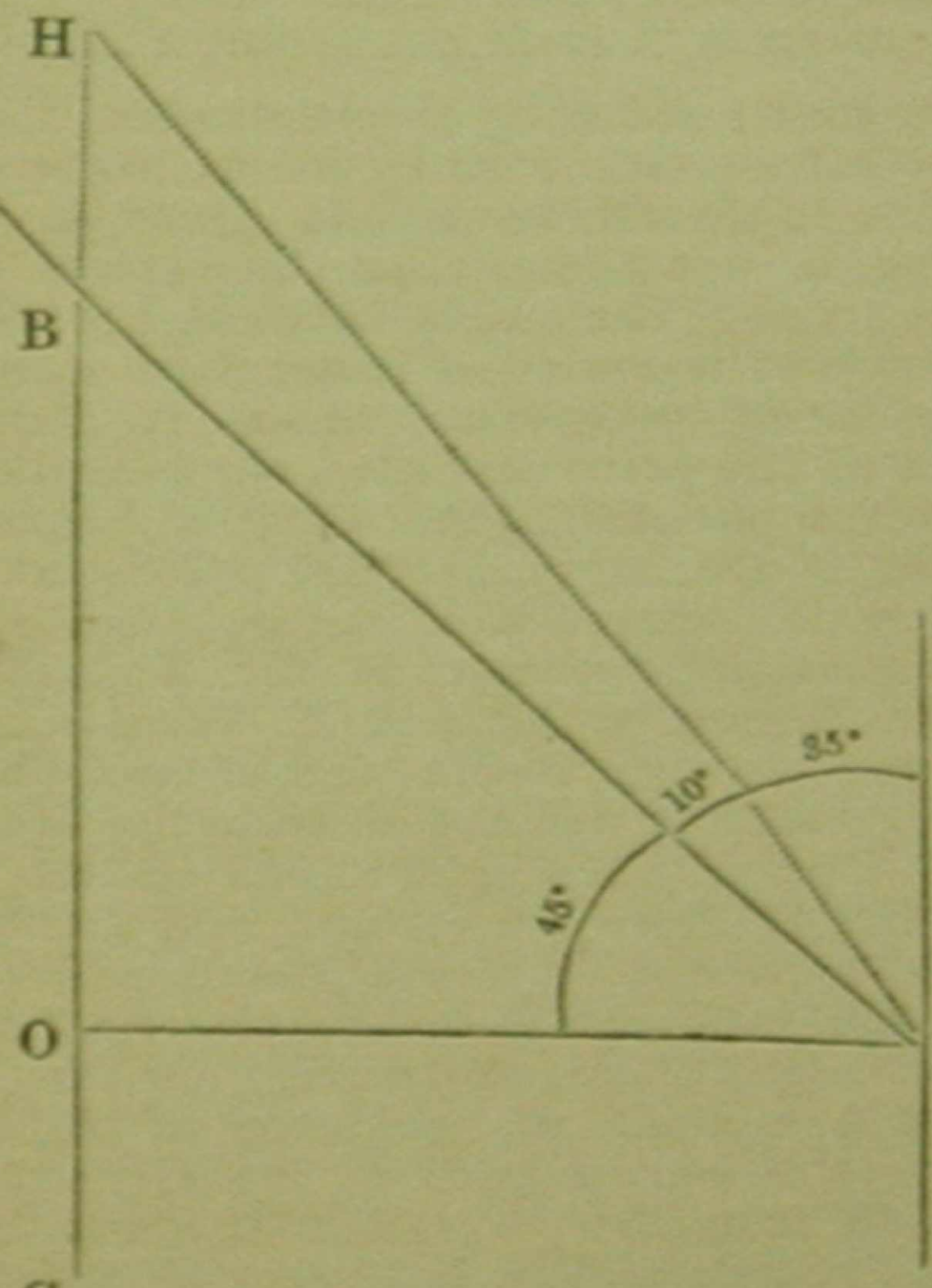
45 degrees rule.

If a wall in the course of erection opposite to an ancient window, would not, when completed, be of such a height as to prevent the light falling on to the window at an angle of forty-five degrees, it may, in the absence of other evidence, be presumed that the wall when finished will not cause a *substantial* diminution of light to such window. In the annexed diagram, the point A represents the ancient window or aperture. GA is the height of the aperture from the ground. AO is a straight line drawn horizontally from the aperture to the obstructing wall, which is represented by GOBH. AO is therefore the distance between the aperture and the obstructing wall. OB is equal in length to AO, and is the height to which the obstructing wall may (under the 45° rule) be raised above the horizontal line AO. AP is the perpendicular above the point (A) of incidence of light over (the point B in) the obstructing wall. The angular elevation or height of OB is 45°, for the triangle AOB is an isosceles triangle with a right angle at the vertex, and the angle BAO is half a right angle. BAP is the angle of incidence of light (over the point B), to the aperture A. This angle is also 45°. If, however, the wall is raised higher than the point B, the angular height of the wall would exceed 45 degrees, and the angle of incidence of light at the aperture will be less than 45°. Thus if the wall be raised to the point H, the angular height of the wall would be (45° + 10° =) 55°, and the angle of incidence of light (45° − 10° =) 35°. A sloping roof of a greater height than OB may not infringe the 45° rule. Thus if BH′ be the sloping roof, the angle of incidence of light over that roof, to the aperture, will be the same as angle BAP which is equal to 45 degrees.



Obstructing wall not to be higher than the distance between it and the window.

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In the case of air, his legal right, in so far as it has not been affected by Act V of 1882, extends only to so much of the use and access of air as may be necessary to prevent his premises being rendered so unhealthy as to be unfit for

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Court, without entering into the merits of the case, ordered the wall so raised by the defendant to be pulled down, being satisfied that the plaintiff would have been entitled to an (interlocutory) injunction for the purpose of keeping matters in *statu quo* (1891, 2 Ch., 27).

Light prevented falling at an angle of 45 degrees. See diagram, p. 453, *supra*.

It has been held that, under ordinary circumstances, the fact that 45 degrees of sky are left unobstructed by a building opposite to the light is *primâ facie* evidence that there is not likely to be material injury. If the building is not higher than the distance between the window and the building, *i.e.*, if the angle of incidence of light over the building to the centre of the window is not more than 45 degrees, the Court will not interfere by injunction, unless it is proved that, under the circumstances of the particular case, the building is likely to cause material injury to the plaintiff. (See City of London Brewery Co. *v.* Tennant, L. R., 9 Ch. App., 212, 220; Goddard, 316; Gale, 639; Tudor, 225; Catherine Clement *v.* J. Melany, decided by Wilson, J., on the 12th August 1884, and reported in the Englishman of the 16th August 1884. In Parker *v.* First A. H. Co., 24 Ch. D., 282, it has been held that there is no conclusion of law or necessary inference of fact that a particular building will not obstruct the light coming to a particular window, if it permits the light to fall on the window at an angle of not less than 45° from the vertical, and that the question of obstruction is to be determined by the evidence adduced in each case. The rule that the claimant should have at least 45° from the zenith, that the angular height of the obstructing building should be less than 45°, or that the angle of incidence of light over the obstructing building to the centre part of the claimant's window should not be less than 45° from the perpendicular above the point of incidence, is not a positive rule of law, but it is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory. Where lights are closed up by high buildings at the *sides*, this rule (if it is a rule) cannot possibly apply. (Delhi and London Bank *v.* Hem Lall Dutt, I. L. R., 14 Calc., 839, 858). The fact that forty-five degrees of light are left is only a small element in the case. It may be used as a sort of test in the absence of any other mode of arriving at a conclusion; but there is no rule of law, no rule of evidence, and no presumption except of the very slightest kind, that, where the angular height of an erection is less than forty-five degrees, the access of light is not substantially interfered with. (Per James, L. J., in Ecclesiastical Commissioners *v.* Kino, 14 Ch. D., 213). A greater amount of evidence is required to prove a material injury to light by *lateral* or *oblique* obstruction than is necessary in a case of direct obstruction. (Clarke *v.* Clarke, L. R., 1 Ch. Ap., 16). The 45° rule may, in London, be a sufficient and fair basis to act on, but it is apprehended that the same basis may not be suitable for India. On a question like this, the climate, habits and convenience of the particular locality should be taken into consideration. (See Bhuban *v.* Elliott, 6 B. L. R., 85, at p. 106).

No hard-and-fast rule.

Does the so-called rule apply to India?

As to the extent of the easement of light, see Moore *v.* Hall, 3 Q. B. D., 178; Ecclesiastical Commissioners *v.* Kino, 14 Ch. D., 213; Radhamohun *v.* Rajchunder, 2 C. L. R., 377. On this subject Mr. Gibbons, in his preface to the 5th Edition of Gale's work, remarks, that "there

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habitation or business."** Under the Easements Act, a disturbance of the right to the free passage of air is actionable, if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health, *i.e.*, though the disturbance does not amount to a nuisance, and does not render the house unfit for occupation.

2. Right to pollute water or air.

The measure of the right to pollute air or water is the extent of the pollution at the *commencement* of the prescriptive period."* (Sec. 28, Act V of 1882).

How far mode and place of enjoyment may be altered.

When the exercise of an easement can, without prejudice to the dominant owner, be confined to, a determinate part of the servient heritage, such exercise must, at the request of the servient owner, be so confined.[1] The rule is that the dominant owner must exercise his right in the mode which is least onerous to the servient owner.[2]

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are cases to meet every taste." See also Ratanji v. Edalji, 8 Bom., 181; Delhi and London Bank v. Hem Lall Dutt, I. L. R., 14 Calc., 839.

** See Delhi and London Bank v. Hem Lall Dutt, I. L. R., 14 Calc., 839, 854, 856; Bagram v. Khetternath, 3 B. L. R., O. C., 18, at p. 52. The relief to be awarded in case of a disturbance of an easement should be confined to what is necessary for its beneficial enjoyment. (Perumal v. Ramasami, I. L. R., 11 Mad., 16, 19). Act V of 1882 allows a suit for the obstruction of the passage of air where it interferes materially with the plaintiff's physical comfort, although it does not render his premises unfit for habitation or business. The right to air is favored as much as the right to light. A right to the enjoyment of a breeze from a particular quarter, or direction, and through a window or other definite aperture, is not so large and indefinite, as the free access of wind to a wind-mill or a chimney. A window is capable of receiving the air in a definite direction only, and only requires an open space for a short distance. (Goddard, 4th Ed., p. 44). A right to currents of air through a window which is almost necessary to the physical comfort of the residents of this country, may, perhaps, be acquired by prescription under Act V of 1882. For the English law on the subject, see City of London B. Co. v. Tennant, L. R., 9 Ch. Ap., 218. For the Indian law in cases to which Act V does not apply, see Barrow v. Archer, 2 Hyde, 125; Bagram v. Khetternath, 3 B. L. R., 45; Delhi and London Bank v. Hem Lall, I. L. R., 14 Calc, 839, 854; and pp. 382, 386, 442 (notes), *supra*.

Right to south or other breeze.

[1] See also Crossley v. Lightowler, L. R., 2 Ch. Ap., 478. The prescriptive period, in the case of pollution of water, does not begin until the pollution perceptibly prejudices the servient heritage. (See p. 436, *supra*).

Pollution, not to be increased.

[2] A riparian proprietor who has a prescriptive right to take, in a particular way and at a particular place, water from a river, and to return such water to the river in a polluted condition, is not entitled to take the water in any other way or place, nor use even his common law right of taking it in such a way as to add to the pollution of the stream. (McIntyre v. McGavin, 1893, A. C., 268). "A proprietor who has prescribed a right to pollute cannot in my opinion use even his common law rights in such a way as to add to pollution." (Per Lord Watson, *ibid.*, p. 277).

[1] Sec. 22, Act V of 1882. Where there are several dominant owners, one of them must not use his right so as to obstruct the exercise by the

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Right of way (exceptional).

Subject to this rule, the dominant owner may alter the mode and place of enjoying the easement, provided he does not thereby impose any additional burden on the servient heritage.[2] But the dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.[3] He has also no right to leave the ordinary track on account of its want of repair, for which the owner of the land is not responsible. (*Bullard* v. *Harrison*, 4 M. and Sel., 387). But if a public way is

Public way.

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others of their rights. Each dominant owner has a right of using a servient lane in such a way as would least affect the others in their enjoyment of the easement. (See Chunder Coomar v. Koylas, I. L. R., 7 Calc., 665, 674 ; and 8 Calc., 677).

[2] See sec. 23, Act V of 1882. An easement is not lost by a slight variation in the enjoyment of it. (Per Phear, J., in Sham Churn v. Tariny, I. L. R., 1 Calc., 422, 427). To hold that any, the slightest variation in the enjoyment of an easement would destroy it, would virtually do away with all easements, as by the effect of natural causes some change must, in the course of time, naturally take place. Changes in the transparency of the glass of windows, wear and tear of frames, growth of shrubs, &c., may effect a slight change in the character of the enjoyment of the easement of light. In the user of a footpath, the foot-steps would never be on the same line or confined accurately to the same width of road. To affect the easement there must be an additional or different servitude, and the change must be material either in the nature or in the quantum of the servitude imposed. (See Harvey v. Walters, L. R., 8 C. P., p. 166).

Slight variations in the enjoyment, allowable.

What is, or is not, imposing a greater burden.

Advancing the eaves of the dominant house may, but raising them to a greater height, does not, ordinarily, impose a greater burden on the servient heritage. (Harvey v. Walters, L. R., 8 C. P., 162). A right to the flow of water or to pollute a stream is not necessarily affected by the conversion of the dominant mill into a different kind of mill, or by using a different material for the manufacture of goods. (Goddard, 4th Ed., 509). So long as the openings or apertures occupied by ancient windows are not enlarged, their condition may be altered by the substitution of more transparent glass or otherwise, so as to make them admit a greater amount of light than before. This cannot increase the burden on the servient heritage. (Turner v. Spooner, 1 Dr. and Sm., 467). The quantity

As regards light.

which has been accustomed to enter an opening is perhaps more accurately described as the quantity which has been enjoyed in respect of the opening. (Michell, p. 99). The owner of a private right of way is entitled to enter the way at one and the same place only ; and he cannot use the way for going to a place beyond the *locus ad quem* if the going to that place was in reality the purpose of his journey. Using the way for going to a place beyond the dominant tenement is imposing an additional burden on the servient heritage. (Goddard, 4th Ed., pp. 375, 380).

As regards ways.

[3] Sec. 23, Act V of 1882 ; see also Goluck v. Tarini, 4 W. R., 49. In Syud Hamid v. Garvain, 15 W. R., 496, Norman, J., held that a person having a prescriptive right of way from one place to another, over a particular line, cannot be compelled to use a different and substituted way. It is otherwise with a right to use another's pathway ; the servient owner may slightly alter the direction of the pathway.

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impassable for want of repair, a traveller may pass along the adjoining land. (Gale, 547; but see note 7, *infra*). *Primâ facie*, the soil *ad medium filum viæ* belongs to the owner of the land on each side of a highway. (*Sham Churn* v. *Tariney*, I. L. R. 1 Calc., 422, at pp. 427, 429).[3a]

Ad medium filum of highways.

It has been held that a prescriptive right of passage for boats over another man's channel is like a prescriptive right of way along another man's private road, and that the servient owner may decrease the width of the channel or the road, if, by so doing, he does not render the exercise of the right less easy than it was before.[4]

Width of private roads.

As an easement is a limiting right, or a right *in alieno solo*, the relief awarded to the dominant owner, in a case of disturbance, should certainly not be more extensive than what is necessary to its beneficial enjoyment.[5] Granting any relief in excess of the plaintiff's right is bad in law. (*Perumal* v. *Ramasami*, I. L. R., 11 Mad., 16, 19). If the *soil* of a road is conveyed any interference with it would be

Relief in case of disturbance of easements.

[3a] If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. Harrison *v.* Duke of Rutland, 1893, 1 Q. B., 142, at p. 155; Mobaruck *v.* Toofany, I. L. R., 4 Calc., 206; Nihal *v.* Azomatali, I. L. R., 7 All., 362.

[4] Durga Churn *v.* Kali Kumar, I. L. R., 7 Calc., 145. See p. 444, *supra*. But the public are entitled to the use of a highway in its entirety and not merely a part sufficient for the purpose for which it is used. Pullin *v.* Reffell, 1891, W. N., 39; Reg. *v.* United Kingdom Telegraph Company, 31 L. J. M. C., 166. It is no defence that the obstruction is made on a part of the highway which is not habitually or ordinarily used for passage, nor that sufficient space is left for public traffic. Pratt, 13th Ed., p. 107.

Width of highways can't be reduced.

As to the rights enjoyed by the owner of the soil of a highway, and as to when a person using a highway except for the purpose of legitimate travel commits a trespass upon that soil as against such owner, see Harrison *v.* Duke of Rutland, 1893, 1 Q. B., 142, and p. 449, *supra*.

Trespass on highways.

[5] With reference to the prescriptive right of light, the question is not what is the least quantity of light the plaintiff can live or work with. (Pollock on Torts, 2nd Ed., p. 358). If the light, as the plaintiff's building enjoyed it, has been substantially diminished to his discomfort or disadvantage, he will get what is necessary to the beneficial enjoyment of the right. He has an absolute right to have substantially the same amount of light admitted into his room through the particular aperture through which it had always passed. Ordering the defendant to open a new window in a different part of the plaintiff's room is a form of relief which the plaintiff cannot be compelled to accept. (Kadarbhai *v.* Rohimbhai, I. L. R., 13 Bom., 674, 676). In considering the question whether the plaintiff's comfort has been materially diminished by the defendant's obstruction of the disputed window, the Courts do not disregard the fact that there are other windows through which light and air are obtained at the time of the obstruction. (Dhunjebhoy *v.* Lisboa, I. L. R., 13 Bom., 252, at p. 263; but cf. Benode Coomaree *v.* Soudaminy, I. L. R., 16 Calc., 252, at p. 257).

Relief, in cases of light.

Other windows in the same building.

As to whether the relief should be by injunction or damages, see note (11), pp. 450—452, *supra*.

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actionable; but where an easement over a road is granted, only the reasonable enjoyment of the road passes. Any reduction of the width of the road in the latter case is not necessarily actionable. (See note *d*, p. 382, *supra*, and *Clifford* v. *Hoare*, L. R., 9 C. P., 362).

Abatement. The dominant owner cannot himself abate a wrongful obstruction of an easement.*

When may excessive user be (extrajudicially) *obstructed.* In the case of excessive user of an easement by the dominant owner, the servient owner may himself obstruct the user, but only on the servient heritage. (Goddard, 4th Ed., p. 340). Such user, however, cannot be obstructed at all when the obstruction would interfere with the lawful enjoyment of the original easement. This occurs in cases where the original and excessive uses are so blended together, that the servient owner cannot impede the excess, without at the same time affecting the enjoyment of the original right. (Sec. 31, Act V of 1882). Except as regards rights to light, the English law, in such cases, sanctions total obstruction of the user, both rightful and wrongful. (Goddard, 4th Ed., p. 341). If the excessive user cannot be obstructed without also obstructing the rightful enjoyment of the easement, Act V of 1882 only allows a suit for compensation or injunction. (Stokes' Anglo-Indian Codes, Vol. I, p. 884). But as increasing the number and size of windows on the dominant heritage is not an unlawful act, the servient owner cannot, in the case of rights to light, sue the dominant owner for such increase. (See note 2, p. 461, *infra*). Where the burden on the servient heritage is materially increased by a permanent change in the dominant heritage, and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement (except in 3 specified cases) is (not merely suspended, but) extinguished under sec. 43, Act V of 1882. (See pp. 461-63, *infra*). Prescriptive easements under Acts IX of 1871 and XV of 1877 are indefeasible, and cannot be extinguished or otherwise affected by this rule. In England, in the case of easements which rest on the basis of an actual or presumed grant, (and which are *not*, like

When a *suit* only is allowed by Act V.

Extinction under Act V.

Prescriptive easements under Acts IX and XV.

Abatement in English and Indian law.

* Although the dominant owner has the right to do acts necessary to secure the full enjoyment of the easement, he cannot himself remove an obstruction. (Sec. 36, Act V of 1882; note (g), p. 386, *supra*). But compare Chunder *v.* Koylash, I. L. R., 7 Calc., 665, at p. 673. Abating a private nuisance is not illegal if there is no real danger of any breach of the peace. (Per Cunningham, J., in the Serampore *Nawbut-Khana* case, I. L. R., 3 Calc., 573, at p. 586). This extrajudicial remedy by which the dominant owner can redress his grievances by his own act, though recognized in olden cases, is now generally avoided even in England. (Goddard, 4th Ed., p. 461). Act V disallows it altogether.

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prescriptive rights to light, declared to be indefeasible), it may be taken to be a general rule that any alteration of a dominant tenement, of such a nature that the tenement or the mode of user is substantially changed in character, or that the burden on the servient tenement is materially increased, will cause the extinction or, at least, the suspension of a right, unless the right was intended for the benefit of the dominant tenement to whatever purpose it should be applied, or in whatever manner the right should be used.[6a] Extinction or suspension in England.

When an easement has been acquired by prescription or otherwise, accessory rights to do acts necessary to secure the full enjoyment of the easement are also acquired. (1) A's easement to draw water from B's well gives A a right of way, over B's land, to and from the well. (2) Where a right of way has been acquired, if the way is out of repair, or a tree is blown down and falls across it, the dominant owner may enter the servient heritage, and repair the way or remove the tree from it. He has no right to leave the ordinary track, for such obstruction or such want of repair. If the servient owner himself obstructs the way, or renders the way impassable, the dominant owner may deviate from the way and pass over the adjoining land of the servient owner. (3) Where A has an easement of support from B's wall and the wall gives way, A may enter upon B's land and repair the wall.[7] The servient owner is not bound to do anything for the benefit of the dominant heritage, but he must not do any act tending to restrict the easement or to render its exercise less convenient.[8] Implied acquisition of accessory or secondary easements. 3 instances. (Cf. I. L. R., 17 Bom., 745). Repair of servient wall

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[6a] See Goddard, 4th Ed., pp. 506, 530, 532, and pp. 460-64, *infra*. Under Act V, sec. 49, an easement is suspended when the dominant or servient owner becomes entitled to possession of the servient or dominant heritage for a limited interest therein.

[7] See sec. 24, Act V of 1882. At common law, the obligation to repair a private way falls on the dominant owner. It is his own fault if the way be impassable for want of repair. He has therefore no right to deviate from the ordinary track on account of its want of repair. (Gale, 547). At common law, the obligation to repair a highway is imposed upon the parish or county. (Gale, 543). As to the right to go *extra viam* in the case of highways and ways of necessity, see Gale, 547; Goddard, 4th Ed., 388-9. The existence of this right in the case of highways is now doubted, and in Arnold *v.* Holbrook, L. R., 8 Q. B., 96, where a public way was dedicated subject to periodical obstruction by ploughing up the soil, it has been held that the public have no right to walk over the adjoining land when the path is so ploughed up. If the grantor of a private way himself obstructs it, there is a right to deviate. (Selby *v.* Nettlefold, L. R., 9 Ch., 111). See pp. 444, 456, 457, *supra*. Repair of private and public ways.

[8] Sec. 27, Act V of 1882. Local usage may oblige the servient owner in cases of customary easements to do something, *e.g.*, to break his dam

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Extinction of *prescriptive* right: 1. When released expressly or impliedly.

A prescriptive easement (like other easements) is extinguished when the dominant owner expressly, or impliedly, releases it to the servient owner. Where there is no *express* release, it would be a question in each case whether the circumstances established an intention to abandon altogether the future enjoyment and exercise of the right.* An alteration in the size of a window or in its plane or inclination does not necessarily amount to an abandonment or implied release of the easement of light. So long as the dominant owner continues to enjoy the cone or the pencils of light which came directly or by refraction into the original window or a substantial part of them, no abandonment will be inferred."* The fact that a building with ancient lights is pulled down, does not destroy the right to

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in Cheyt so as to ensure a certain modicum of water to the dominant heritage. (1 Stokes, 884).

* Sec. 38, Act V of 1882. If the act of the dominant owner manifests an intention on his part to abandon the easement permanently, the dominant heritage being also permanently altered for the purpose, the easement will be at once extinguished by an implied release. In Shama Churn's case (I. L. R., 1 Calc., 422, 426), Phear, J., was inclined to hold that abandonment *qua* abandonment could not be materially operative unless something had been done by the servient owner on the faith of the abandonment so as to be a cause of estoppel against the dominant owner. See also The Queen *v.* Chorley, 12 Q. B., 515.

Estoppel.

Abandonment and release.

"Abandonment is a term which has no legal meaning as to an incorporeal hereditament which (according to English law) can only pass by deed." (Neill *v.* Duke of Devonshire, 8 App. Cas., 135, at p. 154). A release, however, may be implied from the stoppage of user and the surrounding circumstances. (Goddard, 4th Ed., p. 513). A release is also implied where a permanent obstruction of the easement by the servient owner has been expressly authorized by the dominant owner. "Abandonment," if operative, must amount to a release.

Effect of change of position and size of windows.

** Tapling *v.* Jones, 11 H. Lds., 290; Scott *v.* Pape, 31 Ch. Div., 544. If a building is set back, say, 100 feet, it will not enjoy the same cone of light that was enjoyed before, but will have an entirely different cone; and it may be moved so far forward that it will not enjoy the same light as that enjoyed by the old building. (*Ibid.*) One cannot claim a window in one part of his building simply because he has been accustomed to enjoy a window in another part of that building. (Harris *v.* De Pinna, 33 Ch. D., 238, 261). It is otherwise, if the altered window corresponds with some portion of the ancient light. The

Right to light,—not to window.

right is to the ancient light, and not to the ancient window. If the alteration in the building is such that a substantial portion of the rays of light passing over the servient tenement, which would have passed through the old window, will pass through the new one, the right is not lost. (See Goddard, 3rd Ed., pp. 253, 517). To shew that the right is not lost, it is necessary to prove that some defined part of an ancient aperture admitted access of light through the space occupied by a defined part of an existing aperture. General evidence that some part or other of a new window corresponds to some part or other of the old is not sufficient. (Pendarves *v.* Monro, 1892, 1 Ch., 611).

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light, if it be the evident intention of the owner to build new premises preserving the ancient lights. (*Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D., 213. Cf. *Kalee Doss* v. *Bhoobun*, 20 W. R., 185). The pulling down and the re-building should, ordinarily, be continuous enough to shew that the right is not abandoned.[11] A right once abandoned is abandoned for ever. If an intention to abandon a right to light was clearly manifested, the adjoining owner might build as he pleased upon his own land; and should the owner of the previously existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval. (See *Tapling* v. *Jones*, 11 H. L. Cas., 290). Pulling down ancient lights.

A prescriptive easement (like other easements) is also extinguished when it becomes incapable of being at any time, and under any circumstances, beneficial to the dominant owner.[1] 2. When right becomes useless.

Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased, and such increase cannot be reduced by the servient owner without interfering with the accustomed and lawful enjoyment of the easement, the easement, except in three specified cases, is under sec. 43, Act V of 1882, entirely extinguished.[2] The three cases specified in sec. 43 3. When there is increase of burden by permanent change in dominant heritage.

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[11] Moore *v.* Rawson, 3 B. & C., 322; Pollock on Torts, 2nd Ed., p. 359.

[1] Sec. 42, Act V of 1882.

[2] This positive rule laid down by sec. 43 of the Easements Act does not apply to an easement of necessity. Though an easement of necessity is co-extensive with the necessity as it existed when the easement was imposed, the fact that the necessity is more extensive by reason of a subsequent alteration of the dominant tenement, (*e.g.*, the conversion of a dwelling-house into a factory), does not necessarily extinguish the original easement. (See Goddard, 4th Ed., pp. 373, 374). The rule does not also apply to an easement imposed by an actual grant, if the easement was intended by the parties for the benefit of the dominant heritage to whatever extent the easement should be used. (See Goddard, 4th Ed., p. 506). The fact of increasing the weight of an ancient building will not also (under sec. 43 of the Act) have the effect of depriving the owner of his right to that degree of support to which he was entitled as an easement before he increased the weight. (See Goddard, 4th Ed., p. 537). Where the burden on the servient heritage is materially increased, the injury to the servient owner is *primâ facie* considerable, but sec. 43 presupposes the *possibility* of the "materially increased burden" not causing an actionable amount of actual injury to the servient owner. The rule laid down by sec. 43 of the Easements Act is applicable even to rights to light acquired by prescription under the Act. A prescriptive right under sec. 15 is not described as "indefeasible," probably because such rights are defeasible (under sec. 43) by certain attempts to extend the user. (See note 10, p. 446, *supra*). With reference to the easement of light under Three exceptional easements—(1) Of necessity. (2) Of support. (3) Intended to be unlimited. Material burden, and slight injury. Defeasibility of prescriptive rights under Act V.

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Three specified cases excepted.

are cases of (1) easements of necessity, (2) easements of support, and (3) easements of which the extent of user is intended to be unlimited. Where an excessive user of an

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sec. 3 of the English Prescription Act, Lord Westbury observed that the absolute and indefeasible right, which is the creation of the statute, is not subjected to any condition or qualification, nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated. (See Goddard, 4th Ed., p. 447). It may be observed that sec. 43 does not merely suspend the original right till the dominant heritage is restored to its original condition, but extinguishes it altogether. (See note (j), p. 386, *supra*).

Indefeasibility under Acts IX and XV.

Like rights to light under the English Statute, all prescriptive easements under Acts IX of 1871 and XV of 1877 are declared to be "absolute and indefeasible." Such easements cannot, therefore, be entirely defeated or extinguished by excessive user, and the provisions of sec. 43 of Act V of 1882 cannot possibly apply to such easements.

Opening new windows, *not* unlawful.

Opening a new window or enlarging an existing window in one's own building is an innocent act, which cannot give an adjoining owner an enlarged right, or be a cause of forfeiture of any existing right. (See Lord Chelmsford's judgment in Tapling *v.* Jones, 11 H. Lds., 290). The right of the adjoining owner to raise any erection on his own land, so far as that is not impaired by any existing easement, is a natural right, and not a new right to obstruct the access of light. (See Lord Westbury's judgment in the same case). These remarks apply to all windows, old or new, in England or in British India, irrespective of the English Prescription Act, the Easements Act or the Indian Limitation Acts.

Obstruction of excessive user,—of light,—of other easements.

If the servient owner cannot obstruct the new light without obstructing the old one, he cannot obstruct at all. He must submit to the increased burden. (Note, sec. 31, Act V, Appendix; Provabutty *v.* Mohendro, I. L. R., 7 Calc., 453). Where rights are declared to be indefeasible, they cannot, in the absence of an express law, be defeated by anything short of abandonment and release. (See Tapling *v.* Jones, 11 H. L. C., 290). Before the decision of the House of Lords in the last case, the law as to the right to obstruct the excessive user of light was considered to be the same as that which applied to other easements. (See Scott *v.* Pape, 31 Ch. D., 554, 559). Where it was impossible to obstruct the encroachment or excess, without also obstructing the lawful enjoyment of the right to light, it was formerly held that the servient owner was justified in obstructing the whole (Goddard, 2nd Ed., p. 279), at least so long as the encroachment or excess continued. (Gale, 5th Ed., p. 613, note). It has since been decided that the servient owner is not, in any case, justified in obstructing the ancient lights, and that to maintain a suit for an obstruction it is now not necessary that the plaintiff who has enlarged his windows should restore them to their original condition. (Gale, 5th Ed., pp. 608, 609; Goddard, 4th Ed., p. 442).

Sending dirty water instead of clean water through a drain.

Where A has a right to pour clean water into B's drain, and A sends dirty water through the drain, the burden on the servient heritage is materially increased. If this increase is treated as an excessive user of the original right, and if this is not caused by a permanent change in the dominant heritage, the right is not extinguished (even under Act V of 1882), and B (if he cannot obstruct the excessive user without obstructing the lawful enjoyment of the right) may (under Act V of 1882) only sue A for damages or for an injunction

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easement may be obstructed by the servient owner by something done on the servient heritage (as, where 100 buckets of water, instead of 50, are taken from the servient owner's well), he may obstruct the user, provided such obstruction does not interfere with the lawful enjoyment of the easement.[3] In all but the three specified cases, if the excessive user is due to a permanent change in the dominant heritage, and the excess or encroachment cannot be lawfully obstructed, the whole easement is (under Sec. 43, Act V of 1882) extinguished, except, of course, where the

Obstruction of excess when allowable.

It has been held in England that B may obstruct the entire drain—at least so long as the excessive user continues. (Cawkwell *v.* Russel, 26 L. J. Exch., 34; Gale, 5th Ed., p. 613; Goddard, 2nd Ed., p. 279). This, however, is not a case of mere excessive user. It is in truth the exercise of a new and different easement which never existed. Such exercise or user of a new and different right may be obstructed in India as well as in England. (See Gale, 614).

Where a right of way is granted or acquired for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard, thereby materially increasing the burden on the servient heritages, the right may be extinguished. (See Henning *v.* Burnet, 8 Exch., 187; Goddard, 4th Ed., 507).

Changing a cottage into a tanyard.

Lowering the eaves was, in the Civil law, increasing the burthen of the servitus, and therefore not allowable. In Harvey *v.* Walters (L. R., 8 C. P., 162), it has been held in England that the raising of the eaves was not necessarily increasing the burden of the servitude.

Eaves—lowering and raising.

Where the easement is extinguished by excessive user under the conditions mentioned in sec. 43, the servient owner may, of course, obstruct any further user of the easement. The easement being extinguished (and not merely suspended during the continuance of the encroachment or excess), the dominant owner cannot (by removing the encroachment or excess, and restoring his tenement to its original state) sue the servient owner for the re-establishment of the easement.

Extinction, not suspension.

[3] Sec. 31, Act V of 1882. Where the amount of the excessive user can be ascertained and separated, the excess alone is bad, and the original right remains. But where the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed, and if material injury is thereby caused to the servient owner, the right is defeated *in toto*. (Gale, 5th Ed., 615). Where it is impossible to obstruct the excessive user of an easement without also obstructing the rightful enjoyment, the servient owner is probably entitled (except in the case of rights to light) to obstruct the user, both rightful and wrongful, altogether. (Goddard, 4th Ed., 341). But sec. 31 of Act V of 1882 does not sanction or authorise total obstruction by the servient owner in any such case. The section does not allow the servient owner to decide for himself whether the original right is so blended with the excess or encroachment that the former is suspended by the latter, as it would be under English law. He cannot therefore (extra-judicially) obstruct the user at all. But though the extra-judicial remedy of obstructing excessive user cannot be exercised in any such case, the original right may nevertheless be extinguished, and the servient owner may not be obliged to submit for ever to the increased burden on his heritage, if there has been a permanent change in the dominant heritage, and the case falls under

Where *original* right, and *excess*, are inseparably mixed up.

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maxim *de minimis non curat lex* applies, and the injury caused to the servient owner by the excess is so slight that no reasonable person would complain of it.[3a]

4. Permanent alteration of servient heritage by superior force.
5. Either heritage completely destroyed.
6. Unity of title.

A prescriptive right (as well as other easements) may also be extinguished by a permanent alteration of the servient heritage by superior force (such as an earthquake), or by the complete destruction of either the dominant or servient heritage, or by unity of ownership (with or without unity of possession) of the whole of both the heritages.[4] If the destroyed heritage is re-formed or re-built before twenty years have expired, an easement extinguished by destruction of either heritage revives[5] under sec. 51 of the Act.

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sec. 43 of the Easements Act. See notes under sec. 31, Act V of 1882, in the Appendix.

[3a] But as the burden on the servient heritage must be materially increased, by the change in the dominant heritage, the injury to the servient owner can hardly be slight in any case under sec. 43. (See clause (*b*), sec. 43, and Michell, p. 129).

[4] As to the destruction of the dominant heritage causing extinction, see Tukaram *v.* Durga, 1 Hunooman Pershad's (Agra) Rep., 196. See also secs. 44, 45 of Act V of 1882; Goddard, 360, 367. As to unity of title, see pp. 367—9, 406, 419, 420, *supra*. As to suspension, see sec. 49, and note 6*a*, p. 459, *supra*.

Other modes of extinction.

Easements are liable to be extinguished by *estoppel* also. Extinguishment by revocation (in exercise of a power reserved in this behalf) and some other modes (such as extinction by dissolution of right of servient owner from a cause which preceded the imposition of an easement) are not applicable to prescriptive rights. Another mode, not mentioned in Act V, is extinction by Legislative enactment. Thus, an easement, whether imposed by grant or acquired by prescription, is extinguished when the servient heritage is taken under the Land Acquisition Act. (1 Stokes, p. 922). As to revenue sales, see note 2, p. 446, *supra*; but cf. Goluck *v.* Hero, 8 W. R., 62.

[5] Provided that the rebuilt dominant tenement does not impose a greater burden.

Non-user of *public* rights, and *necessary* easements of no effect.

[6] In America, this mode of extinction is confined to prescriptive rights only. In England, non-user of an easement is regarded merely as evidence from which a release may be implied. According to the law of Scotland the continued exclusion of the public for 37 years will not *per se* destroy a pre-existent right of public way, unless it is maintained for the prescriptive period of 40 years; but such exclusion is strong evidence that no such public right ever existed. (Manu *v.* Brodie, 10 App. Cas., 378). Obstruction for a long period is no answer to public rights in England. (Pullin *v.* Reffel, 1891, W. N., 39). Sec. 47 cannot apply to easements acquired by Govt. (p. 439, *supra*). A necessary easement also is not affected by non-user under sec. 47.

No presumption of a lost release under Act V.

As in the case of acquisition by prescription, Act V of 1882 does not assume that a fictitious grant has been made by the servient owner, so, in the case of extinction by prescription, the Act rejects the English doctrine that non-user is only evidence of a presumed non-existing release. See Statement of Objects and Reasons, *India*

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Lastly, easements acquired by long enjoyment, like easements otherwise acquired, may be extinguished by non-enjoyment.[6]. Under Act V of 1882 the same period (twenty years) is fixed for the extinction of an easement by non-enjoyment, as for the acquisition of an easement by enjoyment.

7. When the right has not been enjoyed for 20 years. (*Extinctive* prescription)

No special rule has been laid down for the extinction of an easement acquired by or against Government. A right acquired by a private person by 60 years' user against Government will be extinguished by non-user under the general rules enacted by Act V of 1882. But a right acquired by Government by 20 years' user against a private person will not be affected by those rules. (See p. 439, and note 6, p. 464, *supra*).

Government *not bound* by rule of extinctive prescription.

The following two rules of extinctive prescription have been enacted by sec. 47 of the Act:—

(*a*). A continuous easement (as an easement of light) is extinguished when it totally ceases to be enjoyed as an easement for an unbroken period of twenty years. The period of twenty years is, in this case, to be reckoned from the day on which the enjoyment of the right is obstructed by the servient owner, or rendered impossible (as by bricking up a window) by the dominant owner. If the dominant owner does not, by his own act, render it impossible to enjoy the easement, or if it is not obstructed by the servient owner, mere non-user of the right for *any* period does not extinguish a continuous easement. A cessation of enjoyment in pursuance of a contract between the dominant and servient owners cannot extinguish the right. Enjoyment by one of several co-owners prevents extinction.

(*a*) Extinction of continuous easements by prescription.

Mere non-user insufficient.

(*b*). A discontinuous easement (as a right of way) is extinguished when it has not been enjoyed[7] as an easement for an unbroken period of twenty years—such period being reckoned from the day on which it was last enjoyed by any person as owner or occupier of the dominant heritage. But if, before the expiry of the twenty years, the dominant owner registers (under the Indian Registration Act, 1877) a declaration of his intention to retain such easement, it

(*b*) Extinction of discontinuous easements by prescription.

Prevented by registration.

Gazette, 13th November 1880, Part V, p. 470. As to the English law on the subject of non-user, see Moore *v.* Rawson, 3 B. and C., 322; Brown, 227, *et seq.*; Goddard, 4th Ed., 500, *et seq.*

[7] In England, non-user, even in the case of discontinuous easements, is generally the principal evidence of abandonment of an easement, but non-user is not by itself conclusive evidence that the right is abandoned, for it may be explained by, and must be considered with, the surrounding circumstances; it must, moreover, always be a question as to the intention with which the user was given up. (Goddard, 4th Ed., pp. 514, 515). See pp. 414, 415, *supra*, and note 4, p. 467, *infra*.

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shall not be extinguished under this rule, until a period of twenty years has elapsed from the date of the registration. A cessation of enjoyment in pursuance of a contract between the dominant and servient owners, or a cessation of enjoyment by only some of several co-owners, does not extinguish the right. Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, enjoyment of any of the ways (being virtually an enjoyment of a *part* of the whole) will prevent the extinction of the easement.

What is no cessation.

Way over *several* heritages.

Enjoyment or exercise of a right by the owner or occupier of the dominant heritage in ignorance of his right to do so, or the exercise of a right accessory to the easement, is not such enjoyment of the easement as would prevent its extinction under sec. 47. And where an easement is exercisable only at a certain place or at certain times, or between certain hours, or for a particular purpose, its exercise during the twenty years at another place, or at other times or between other hours, or for another purpose, is not such enjoyment as is necessary to keep alive the easement.

What is "no enjoyment."

The circumstance that, during the twenty years, no one was in possession of the servient heritage, or that the easement could not (by reason of an accident or otherwise) be exercised, or that the dominant owner was not aware of its existence, does not exempt the dominant owner from the penalty of extinction under Act V of 1882.

What explanation insufficient under the Act.

Where the dominant owner exercises for twenty years a right less extensive than that to which he is entitled, some systems of law lay down that his easement shall be reduced to the right actually exercised. Act V of 1882 omits all provisions on this head.[a]

Reduction or abridgment by prescription.

The extinction of the primary easement necessarily extinguishes accessory or secondary easements. (Sec. 48).

It should be observed that the positive rules of extinctive prescription laid down by sec. 47 of Act V of 1882 are not declaratory of the law as it existed before their enactment, and that such rules are not of any force, in Provinces to which the Act has not been extended.

Sec. 47 *not* applicable to the *whole* of British India.

The law regards with less favour the acquisition and preservation of rights of easement than of those rights which are naturally incident to property. It does not, therefore, require the same amount of proof of the extinction as of the original establishment of the right.[b] But the mere cessation

Analogous rules under the English and the old Indian law. Three general modes of extinction.

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[a] *Ind. Gaz.*, 13th November 1880.

[b] Gale, 386. Extinction may be by (1) Act of Parliament, (2) by operation of law (*e.g.*, by increase of burden and material alteration

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of enjoyment is not in any case sufficient to extinguish an easement.[10] An easement is abandoned or extinguished by non-user, (*a*) if the surrounding circumstances clearly show that the dominant owner intends to relinquish it permanently[1]; or (*b*) if the circumstances are such as are calculated to mislead the servient owner and cause him to incur expense or loss on the reasonable belief that the right has been permanently relinquished[2]; or (*c*) if the cessation of user has been caused by an adverse act acquiesced in by the dominant owner.[3] If there are no circumstances to aid the presumption of an abandonment or the reverse, no presumption of an abandonment ought to be made until non-user has continued for twenty years; but there are cases in which even this would not be sufficient. The duration of the non-user must always be considered in conjunction with the nature of the easement in dispute, and the surrounding circumstances if any.[4] Non-user for 106 years of a right of access to mines (reserved in a grant of land) was not, by itself, considered sufficient.[5]

When extinguished by non-user.

Non-user for 20 years may raise the *presumption* of a *release*, in *some* cases.

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of dominant tenement), (3) by the act of the dominant owner (*e.g.*, express release, or non-user under circumstances which imply a release). An easement can never be extinguished by the act of the servient owner. (Goddard, 4th Ed., 503).

[10] Crossley *v.* Lightowler, L. R., 2 Ch., 482. "*Time* is not a necessary element in a question of *abandonment*, as it is in the *acquisition* of a right." See p. 460, *supra*; note 7, *supra*, and note 4, *infra*.

[1] *Ibid.*; Tapling *v.* Jones, 11 H. L., 290.

[2] Stokoe *v.* Singers, 8 E. & B., 31; Gale, 594; Regina *v.* Chorley, 12 Q. B., 515; Gale, 596; Shamchurn *v.* Tariney, I. L. R., 1 Cal., 422, 426.

[3] Regina *v.* Chorley. See also Banee *v.* Ram, 10 W. R., 316.

[4] Goddard, 4th Ed., pp. 514—518.

It is not so much the *duration* of the cesser, as the *nature* of the act, done by the dominant owner, or of the adverse act acquiesced in by him, and the *intention* in him which either the one or the other indicates, which are material for the consideration of the Court. (Regina *v.* Chorley, 12 Q. B., at p. 519; Goddard, 4th Ed., p. 518).

[5] Goddard, 4th Ed., p. 515. Seaman *v.* Vawdrey, 16 Ves., 390.

A mere interruption of the possession or user (though extending over many years) cannot be held to have the effect of *destroying* an established right. Such interruption may have been permitted or tolerated by the owner without any intention of abandoning his right. (See the judgment of Lord O'Hagan in Neil *v.* Duke of Devonshire, 8 App. Cas., 135, 170).

Destroying an established right.

The presumption of enjoyment as of right arises from long continued user when such user is relied upon to *establish* a prescriptive right. But when long enjoyment of an opposite right is relied upon to displace or *defeat* an established prescriptive right, such a presumption would be neither reasonable in fact nor necessary in law. (See the judgment of Lord Selborne, *ibid.*, p. 156). But where the alleged title is not fully established, or where there is no sufficient proof of a

Establishing a prescriptive right.

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Onus on dominant owner to explain away long-continued non-user.

Although the mere suspension of the exercise of an easement is not sufficient to prove an intention to abandon it, in the case of a long-continued suspension the onus lies upon the dominant owner of showing that some indication was given, during the time, of his intention to preserve it, or that he intended to resume it within a reasonable period.[6] The effect of long-continued non-user may be explained away by showing that the dominant owner had no occasion to use the easement, or that the cessation occurred in consequence of an agreement whereby he gave up his right temporarily, or that the non-user was a consequence of the temporary substitution of another and a more convenient mode of enjoying the same benefit.[7]

English and Indian cases.

In England, a right of way was held not to have been extinguished by mere non-user for a period much longer than twenty years, the effect of the non-user being explained away by the fact that the dominant owner had a more convenient mode of access through his own land.[8] On the other hand, it has been held by a Division Bench of the Calcutta High Court that a right of passing freely over another's land requires to be kept up by constant use, and that if the use of such right is discontinued for the space of six years, it cannot be re-established by suit.[9] But in *Khetternath* v. *Prosunno* (7 W. R., 498), Mr. Justice Markby held that the abandonment of an easement, as well as of a natural right, might be implied from a long and continuous interruption on the part of the servient owner *submitted to* by the dominant

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contemporaneous possession consistent with such title, adverse possession of an opposite right would furnish ground for building a presumption of a subsequent retransfer or reconveyance. (See the judgment of their Lordships of the Privy Council in Gunga Gobind Mundle *v.* The Collector, 7 W. R., P. C., 21, 23).

Question of intention to abandon how decided.

The abandonment of a right of way is a question of intention to be decided upon the facts of each particular case. It must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it. It has been held that non-user by the dominant owner, coupled with user by the servient owner for farm purposes, of portions of land, subject to the easement, when the easement was not required, cannot prove an abandonment of the entire right, and was inconclusive to prove an abandonment of even portions thereof. (James *v.* Stevenson, 1893, A. C., 162, 168).

[6] Crossley *v.* Lightowler, L. R., 2 Ch., 478; Weston *v.* Arnold, 8 L. R., Ch. App., 1384; Tudor, 232.

[7] Goddard, 4th Ed., pp. 515, 520.

[8] Ward *v.* Ward, 7 Exch., 888; Gale, 625.

[9] Hurree Dass *v.* Jodoonath, 14 W. R., 79; 5 B. L. R., App., 66. But see Kurupam *v.* Meranji, I. L. R., 5 Mad., 253, referred to in note 1, p. 414, *supra*.

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owner.[10] In 1872, Westropp, C. J., and Lloyd, J., held that simple non-user of an easement was not an abandonment of it. The question in such cases is whether there was an intention to renounce the right, evinced by the conduct of the owner of the dominant heritage.[1]

Release or extinguishment when possible.

It has been already pointed out that, under Act XV of 1877, or Act V of 1882, an easement cannot be acquired by prescription until there has been a suit between the contending parties.[2] If there has been no such suit, and consequently no such acquisition of an easement, no question of release or extinguishment can arise. In such a case the question will be whether the user has been sufficient for the acquisition of the right.[3]

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[10] On this subject, see also Kena Mahomed *v.* Bohatoo, Marshall, 506; Juggutbundhoo *v.* Juggutchunder, 12 W. R., 519; and pp. 414, 415, notes, *supra*. For Mr. Justice Phear's opinion, see note 9, p. 460, *supra*, and I. L. R., 1 Calc., 422, 426.

[1] Braason's Digest of Unreported Bombay Cases, 89.

[2] See Goddard, 4th Ed., pp. 518, 519, 534. See also p. 436, *supra*. Where the plaintiff has already obtained a decree declaring his right to an easement under the statutory rule of prescription, his suit for the removal of a subsequent obstruction may be treated as founded on a title independent of the statute. (See the judgment of Norris, J., in second appeal No. 162 of 1892, decided on the 17th August 1892, and notes under sec. 26 of Act XV of 1877, in the Appendix).

[3] A cessation of user, which is not explained consistently with continued enjoyment, may amount to a discontinuance, and be held to be fatal to the acquisition of the right. See pp. 432-4, notes, *supra*.

N.B.—All references to Gale and Goddard, in the absence of an express indication, are references to the 5th Edition of Gale, and the 2nd Edition of Goddard on Easements.

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